1–11–05 Tuesday
Vol. 70 No. 7 Jan. 11, 2005

Pages 1789–1994

Federal Register

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Federal Register
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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1466

Environmental Quality Incentives Program; Conservation Innovation Grants

AGENCY: Natural Resources Conservation Service, Commodity Credit Corporation, U.S. Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: In this document, the Natural Resources Conservation Service (NRCS) affirms, with changes, the provisions of an interim final rule that added provisions regarding Conservation Innovation Grants (CIG) to the Environmental Quality Incentives Program (EQIP). The regulations implement statutory provisions designed to provide competitive grants to eligible Indian Tribes; State or local units of government; non-governmental organizations; and individuals. The purpose of CIG is to stimulate the development and adoption of innovative conservation approaches and technologies while leveraging the Federal investment in environmental enhancement and protection, in conjunction with agricultural production.

DATES: *Effective date:* January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Kari Cohen, Natural Resources Conservation Service, 14th and Independence Avenue SW., Room 5239–S, Washington, DC 20250. Phone: (202) 720–2335; facsimile: (202) 720–4265. Send e-mail to: *kari.cohen@usda.gov*. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at (202) 720–2600.

SUPPLEMENTARY INFORMATION: In this document, the Natural Resources Conservation Service (NRCS) affirms, with changes, the provisions of an interim final rule that was published in the **Federal Register** on March 29, 2004 (69 FR 16392). The interim final rule added provisions regarding Conservation Innovation Grants (CIG) to the regulations for the administration of the Environmental Quality Incentives Program (EQIP). The added regulations implement statutory provisions designed to provide competitive grants to eligible Indian Tribes; State or local units of government; non-governmental organizations; and individuals to stimulate the development and adoption of innovative conservation approaches and technologies while leveraging the Federal investment in environmental enhancement and protection, in conjunction with agricultural production.

The interim final rule provided a 60-day public comment period that closed on May 28, 2004. NRCS received seven submissions that raised issues discussed below. Based on the rationale set forth in the interim final rule and this document, NRCS adopts as a final rule the provisions of the interim final rule that appeared in the **Federal Register** on March 29, 2004, except the NRCS makes a few modifications to those provisions and describes those changes below. You may access this final rule via the Internet through the NRCS home page at *http://www.nrcs.usda.gov*. Select ''Farm Bill.''

CIG Program

Of the nearly 1.4 billion acres of private land in the United States, 931 million acres, or roughly 70 percent, are in agricultural use. The activities on these lands have a direct effect on soil, water, air, plant, and animal resources, as well as the social, cultural, and economic condition of U.S. communities, towns, and counties. Regional and local differences in farm structure, farm practices, and farm products make delivering innovative agricultural conservation technical assistance a challenge. National agricultural research and development may not always have the capacity to develop, test, and transfer new or innovative conservation technologies and approaches rapidly or effectively to account for regional variances in the agricultural industry. Consequently, there is a need to develop, test, implement, and transfer innovative farm and ranch conservation technologies and approaches for adoption in the largest applicable market.

To address this need, Section 1240H of the Food Security Act of 1985, 16 U.S.C. 3839aa–8, was added by section 2301 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171), and established CIG as part of EQIP. Through CIG, the Secretary of Agriculture may pay the costs of competitive grants to carry out projects that stimulate innovative approaches to leveraging the Federal investment in environmental enhancement and protection in conjunction with agricultural production.

The Secretary of Agriculture delegated the authority for the administration of EQIP, including CIG, to the Chief of NRCS, who is a vice president of the Commodity Credit Corporation (CCC). EQIP is administered using the funds, facilities, and authorities of the CCC.

CIG is administered using a two-tiered approach. Grants may be awarded through both National and State-level competitions. Funding availability for the CIG National component will be announced in the **Federal Register** through a Request for Proposals (RFP). In addition, the Chief may provide each NRCS State Conservationist with the discretion to implement a separate State-level component of CIG.

The Chief will determine the funding level for the National component on an annual basis. CIG funds for the National component will be designated from the National EQIP allocation. Funding availability for State-level competitions will be announced through public notices, separately from the National program. Applications will be solicited from eligible governmental and non-governmental organizations and individuals for single or multi-year projects.

Comments

Project Eligibility

The provisions of § 1466.27(b)(4) state that ''Technologies and approaches that are eligible for funding in the project's geographic area through EQIP are not eligible for CIG funding.'' Commenters expressed concern that this sentence would be broadly interpreted to exclude

innovation associated with established technologies and approaches. This was not intended. Therefore, NRCS changed paragraph (b)(4) to clarify that the quoted provisions do not prohibit funding of technologies and approaches that are similar to established technologies and approaches as long as the project includes significant innovative differences.

With respect to project eligibility, the interim final rule stated that all agricultural producers participating in a CIG project must meet the basic eligibility requirements for EQIP. This was not intended to impose the eligibility requirements on individuals or entities not receiving direct or indirect payments, such as an organization locating an innovative technology on a producer's property without providing a payment. Accordingly, we clarified the regulations to state that all agricultural producers receiving a direct or indirect payment through participation in a CIG project must meet the eligibility requirements.

One commenter urged NRCS to ensure that CIG-funded projects would include a broad spectrum of agricultural operations, large and small, crop and livestock, etc. One commenter expressed concern that the language in the interim final rule favored grant applications from individuals over applications from non-profit organizations and units of government. NRCS made no changes based on these comments. Consistent with the statutory authority at 16 U.S.C. 3844, the CIG rule contains special provisions for limited resource farmers or ranchers that would constitute a small portion of CIG grant awards. Otherwise, the National and State-level competitions under CIG are designed to minimize any bias in favor of a class of applicants.

One commenter urged NRCS to set aside CIG funds for Latina women farmers and ranchers. NRCS made no changes based on this comment. NRCS has no authority to make awards based on gender or race.

Identification of Natural Resource Concerns

Under the provisions of § 1466.27(d), CIG applications must address natural resource conservation concerns that are identified by the Chief of NRCS and published in the RFP. Also, under the provisions of § 1466.27(d), the natural resource concerns may change each year. The RFP for FY 2004 identified five resource concerns with more specific subtopics. One commenter asserted that this listing of natural resource concerns is too broad, and that only two or three natural resource priorities should be identified each year. Additionally, a number of commenters made suggestions as to what natural resource concerns should be identified in the RFP. NRCS made no changes based on these comments. As explained in the preamble to the interim final rule, NRCS has designed a protocol for soliciting input on which natural resource concerns should be identified in an RFP. NRCS will consider the suggestions of commenters when compiling the natural resource concerns to be listed in the next RFP. The number and scope of the natural resource concerns will be based on the funding available to meet the needs identified by interested stakeholders.

Funding

For CIG, NRCS established two types of grants for funding projects, one awarded at the National level and one awarded at the State level. For FY 2004, the Chief established a maximum funding limit of $1 million per project for the National competition. Also, under § 1466.27(h)(3), the maximum funding limit per project awarded at the State-level competition may not exceed $75,000.

The provisions of § 1466.27(c) state that the Chief of NRCS (or his or her designee) will determine the funding level for the National component of CIG on an annual basis from the total funding available for EQIP. One commenter recommended that these provisions be changed to provide that National CIG funding be a set percentage of EQIP, such as10 percent. One commenter recommended that NRCS State Conservationists be allowed to designate up to 10 percent of their EQIP allocation for the State component of CIG. Another commenter recommended that the funding for CIG be a minimum of $50 million annually. NRCS made no changes based on these comments. As stated in the preamble to the interim final rule, provisions regarding the funding level for CIG provide the decision maker ''with maximum flexibility to adjust to changing levels of available funds and program conditions'' (69 FR 16394).

With respect to the National competition, one commenter asserted that the $1 million project cap was adequate and another commenter asserted the $1 million project cap would be insufficient for large trading programs. NRCS made no changes based on these comments. Funding limits for the National competition will be announced in each RFP based on overall EQIP funding.

With respect to the State-level competition, one commenter recommended that NRCS raise the cap from $75,000 to $450,000. NRCS made no changes based on this comment. The State-level competition was designed to target CIG funds to individual producers and smaller organizations that would have difficulty generating the 50 percent required match for large awards. NRCS also believes that there should be some distinction between the National and State competitions. Proposals larger in scope and funding should be submitted to the National competition. Smaller proposals should be submitted at the State level.

One commenter suggested that instead of utilizing all available CIG funds on natural resource concerns identified in the RFP, NRCS should reserve a portion of the funds for exceptional applications that address natural resource concerns not identified in the RFP. NRCS made no changes based on this comment. The adoption of this suggestion would place undue emphasis on funding approaches or technologies that would not address the most critical natural resource concerns.

Ranking

The interim final rule provides for applications to be evaluated and ranked by a peer review panel. The interim final rule then provides for the proposal rankings to be forwarded to the Grant Review Board to make funding recommendations to the Chief. The interim final rule further provides that the peer review panel will consist of Federal and non-Federal technical advisers who posses specified qualifications and that the Grant Review Board will consist of five NRCS officials. One commenter recommended that NRCS expand the Grant Review Board to include at least two members outside of government agencies. NRCS made no changes based on this comment. NRCS has been delegated authority to administer the CIG program and believes that the members of the Grant Review Board have sufficient expertise to make funding recommendations to the Chief.

One respondent recommended that NRCS provide greater weight to projects that address multiple natural resource concerns. NRCS made no changes based on this comment. Grants for CIG should be awarded based on the quality of the proposal and not on the number of natural resources concerns addressed.

Evaluating Performance

One commenter asserted that for grants exceeding $250,000, the grantee should be required to establish a

monitoring plan with up to 5% or the total grant amount reserved for evaluating performance. The commenter also asserted that for grants of lower amounts, NRCS should provide simple on-line tools for evaluating performance. We made no changes based on these comments. The CIG program already has provisions for evaluating performance. As stated in the ''Notice of request for proposals,'' an application for CIG must ''Describe the methodology or procedures to be followed to evaluate the project, determine the technical feasibility, and quantify the results of the project for the final report (69 FR 16403).'' The notice further states that ''Grant recipients will be required to provide a quarterly report of progress and a final project report to NRCS (69 FR 16403).'' These provisions do not require the grantee to set aside a specific percentage of the grant award, but do require the grantee to allocate sufficient resources to evaluate project results.

Effective Date

This document makes non-substantive changes and makes changes that lessen restrictions. Accordingly, this document is made effective on publication in the **Federal Register**.

Executive Order 12866

The CIG program was authorized as part of EQIP, with an unspecified annual funding level from FY2003 through FY2007. This rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this interim final rule is not a significant rulemaking action. Therefore, completion of a benefit-cost assessment of potential impacts is not necessary. An economic evaluation was completed, however, because of the aid that such an evaluation provides to the rulemaking process. A copy of this document is available upon request from: Kari Cohen, Natural Resources Conservation Service, 14th and Independence Avenue SW., Room 5239-S, Washington, DC 20250. Phone: (202) 720–2335; facsimile: (202) 720–4265.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because NRCS is not required by 5 U.S.C. 533, or any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Evaluation

Promulgation of this rule does not authorize any activities that will affect the human environment. This rule establishes the policies and procedures that will be used to award Conservation Innovation Grants. The grants awarded under this rule are for innovative projects; therefore, NRCS has a limited ability to predict the types of actions that may be carried out during a CIG project. Any attempt to analyze the effects of proposed actions would be speculative. Accordingly, neither an Environmental Assessment (EA) nor an Environmental Impact Statement (EIS) has been prepared at this time. Instead, the environmental effects of each CIG proposal will be evaluated on a case-by-case. As a part of the evaluation, CIG applicants are required to submit an environmental profile as part of their application. These profiles will be used to determine whether an EA or EIS is needed for any given project, prior to the awarding of grant funds.

Paperwork Reduction Act

Section 2702(b)(1)(A) of the 2002 Act provides that the promulgation of rules and the administration of title II of the Act shall be made without regard to chapter 35 of title 44 of the United States Code, the Paperwork Reduction Act. Accordingly, these rules and the forms, and other information collection activities needed to administer the program authorized by this rule, are not subject to provisions of the Paperwork Reduction Act, including review by the Office of Management and Budget.

Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act (GPEA) and with the Freedom to E-File Act, which require Government agencies in general, and NRCS in particular, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Executive Order 12998

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this rule are not retroactive. The provisions of this rule preempt State and local laws to the extent that such laws are inconsistent with this rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614, 780, and 11 must be exhausted.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Pursuant to Section 304 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 104–354), NRCS did not classify this rule as major and, therefore, NRCS did not conduct a risk analysis. A risk analysis was completed on the EQIP program, establishing that EQIP will produce benefits and reduce risks to human health, human safety, and the environment in a cost-effective manner. A copy of the EQIP risk analysis is available on request from Harry Slawter, Environmental Improvement Programs Branch Chief, Natural Resources Conservation Service, 14th and Independence Avenue, SW., Room 5239–S, Washington, DC 20250, and electronically at *http://www.nrcs.usda.gov/programs/Env_Assess/EQIP/EQIP_RA_121002.pdf*.

Unfunded Mandates Reform Act of 1995

NRCS assessed the effects of this rulemaking action on local, State, and Tribal governments, and the public. This action does not compel the expenditure of $100 million or more by any local, State, or tribal governments, or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

List of Subjects in 7 CFR Part 1466

Conservation, Grant Review Board, Grants, Innovation, Natural Resources, Peer Review Panel.

■ For the reasons stated in the preamble, the Commodity Credit Corporation adopts as final the interim rule published at 69 FR 16392 on March 29, 2004, with the following changes:

PART 1466—ENVIRONMENTAL QUALITY INCENTIVES PROGRAM

■ 1. The authority citation for part 1466 continues to read as follows:

Authority: 15 U.S.C. 714b and 714c; 16 U.S.C. 3839aa–3839aa–8.

■ 2. In § 1466.27, paragraphs (b)(4) and (e)(2) are revised to read as follows:

§ 1466.27 Conservation Innovation Grants (CIG).

* * * * *

(b) * * *

(4) *Program focus.* Applications for CIG should demonstrate the use of innovative approaches and technologies to leverage Federal investment in environmental enhancement and protection, in conjunction with agricultural production. CIG will fund

projects that promote innovative on-the-ground conservation, including pilot projects and field demonstrations of promising approaches or technologies. CIG projects are expected to lead to the transfer of conservation technologies, management systems, and innovative approaches (such as market-based systems) into NRCS technical manuals and guides, or to the private sector. Technologies and approaches eligible for funding in a project's geographic area through EQIP are not eligible for CIG funding except where the use of those technologies and approaches demonstrates clear innovation. The burden falls on the applicant to sufficiently describe the innovative features of the proposed technology or approach.

* * * * *

(e) * * *

(2) *Project eligibility.* To be eligible, projects must involve landowners who meet the eligibility requirements of § 1466.8(b)(1) through (3) of this part. Further, all agricultural producers receiving a direct or indirect payment through participation in a CIG project must meet those eligibility requirements.

* * * * *

Signed in Washington, DC, on January 3, 2005.

Bruce I. Knight,

Vice President, Commodity Credit Corporation, Chief, Natural Resources Conservation Service.

[FR Doc. 05–511 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Office of Energy Policy and New Uses

7 CFR Part 2902

RIN 0503–AA26

Guidelines for Designating Biobased Products for Federal Procurement

AGENCY: Office of Energy Policy and New Uses, Office of the Chief Economist, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture is establishing guidelines for designating items made from biobased products that will be afforded Federal procurement preference, as required under section 9002 of the Farm Security and Rural Investment Act of 2002.

DATES: This rule is effective February 10, 2005.

FOR FURTHER INFORMATION CONTACT: Marvin Duncan, USDA, Office of the Chief Economist, Office of Energy Policy and New Uses, Room 361, Reporters Building, 300 Seventh Street, SW., Washington, DC 20024; e-mail: *mduncan@oce.usda.gov*; telephone (202) 401–0532. Information regarding the Federal Biobased Products Preferred Procurement Program is available on the Internet at *http://www.biobased.oce.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Authority

These guidelines are established under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), 7 U.S.C. 8102 (referred to in this document as ''section 9002'').

II. Overview of Section 9002

Section 9002 provides for preferred procurement of biobased products by Federal agencies. Federal agencies are required to purchase biobased products, as defined in regulations to implement the statute (i.e., this final rule), for all biobased products within designated items costing over $10,000 or when the quantities of functionally equivalent items purchased over the preceding fiscal year equaled $10,000 or more. Procurements by a Federal agency subject to section 6002 of the Solid Waste Disposal Act (42 U.S.C. 6962) are not subject to the requirements under section 9002 to the extent that the requirements of the two programs are inconsistent. Federal agencies must procure biobased products unless the biobased products within designated items are not reasonably available, fail to meet applicable performance standards, or are available only at an unreasonable price.

The Office of Federal Procurement Policy (OFPP) and the USDA will work in cooperation to ensure implementation of the requirements of section 9002 in the Federal Acquisition Regulation (FAR). In this document, USDA is establishing guidelines addressing the designation process, how to determine the biobased content and other attributes of specific products, and cost sharing for product testing. In addition, to provide context, these guidelines address, but do not specifically implement, the procurement specific aspects of section 9002. USDA consulted with the Environmental Protection Agency (EPA), the General Services Administration (GSA), and the Department of Commerce's National Institute of Standards and Technology (NIST) in preparing the proposed guidelines that it is finalizing in this rule.

To provide context, these guidelines include the statutory requirement that Federal agencies have in place, within one year of the publication of final guidelines, a procurement program that assures biobased products within designated items will be purchased to the maximum extent practical. Those procurement programs will have to contain a preference program for purchasing biobased products within designated items, an agency promotion program, and provisions for the annual review and monitoring of an agency's procurement program. In addition to establishing a preferred procurement program, as items are designated, Federal agencies may need time to adjust procurement practices. In accordance with section 9002(c) and (d), designation rules will specify the time frames within which such adjustments must occur.

In designating items (generic groupings of specific products such as crankcase oils or synthetic fibers) for preferred procurement, USDA will consider the availability of such items and the economic and technological feasibility of using such items, including life cycle costs. Federal agencies will be required to purchase products that fall within an item only after that item has been designated for preferred procurement. In addition, USDA will provide information to Federal agencies on the availability, relative price, performance, and environmental and public health benefits of such items and, where appropriate, will recommend the level of biobased content to be contained in the procured product. Manufacturers and vendors will be able to offer their products to Federal agencies for preferred procurement under the program when their products fall within the definition of an item that has been designated for preferred procurement and the biobased content of the products meets the standards set forth in the guidelines.

Section 9002 provides that USDA, in consultation with the Administrator of the EPA, shall establish a voluntary program authorizing producers of biobased products to use a ''U.S.D.A. Certified Biobased Product'' label. In a subsequent rulemaking, USDA intends to establish that voluntary program and provide eligibility criteria and guidelines for the use of the ''U.S.D.A. Certified Biobased Product'' label.

Section 9002 provides funds to USDA to support the testing of biobased products to carry out the provisions of

the section. This rule addresses how USDA will use these funds.

The legislative history of Title IX of FSRIA suggests that Congress had in mind three primary objectives that would apply to section 9002. The first objective is to improve demand for biobased products. This would have a number of salutary effects, one of which would be to increase domestic demand for many agricultural commodities that can serve as feedstocks for production of biobased products. Another important effect would be the substitution of products with a possibly more benign or beneficial environmental impact, as compared to the use of fossil energy based products.

As a second objective, Congress wants to spur the development of the industrial base through value-added agricultural processing and manufacturing in rural communities. Since biobased feedstocks are largely produced in rural settings and, in many cases because of their bulk, require pre-processing or manufacturing close to where they are grown, increased dependence on biobased products appears likely to increase the amount of pre-processing and manufacturing of biobased products in rural regions of the Nation. This trend would help to create new investment, job formation, and income generation in these rural regions.

The third objective is to enhance the Nation's energy security by substituting biobased products for fossil energy-based products derived from imported oil and natural gas. The growing dependence of the Nation on imported oil and natural gas, along with heightened concerns about political instability in some of the oil rich regions in the world, have led the Congress to place a higher priority on domestic energy and biobased product resources.

To assist manufacturers and vendors and Federal agencies in understanding the steps they will need to follow in participating in this program, USDA has included the following brief listing of steps under the item designation process, manufacturer and vendor guidance, and the procurement process.

Item Designation Process:

1. USDA gathers product data and vendors may voluntarily provide product information on:

a. Technological and economic feasibility (functional performance, commercially available, etc.).

b. Samples for testing for biobased content.

c. Information to determine environmental and public health benefits and life cycle costs (through BEES analysis).

2. USDA extrapolates the data to describe an Item.

3. USDA issues a proposed rule to designate an Item.

4. The public comments on the proposed rule.

5. USDA takes comments into consideration.

6. USDA issues a final rule designating an Item.

7. Designated Items are posted on Web site.

8. Manufacturers/vendors are invited to post on the Web site their specific product information under a designated Item.

Manufacturer and Vendor Guidance:

1. Manufacturers/vendors must certify the biobased products content of their products.

2. Manufacturers/vendors may post products on Web site and may market products with claims for:

a. Biobased products content:

(1) Must meet minimum content as defined by the designated Item description.

(2) Content must be verified upon request from Federal agency.

(3) Verification must be based on testing by an independent testing entity using ASTM D6866.

b. Life cycle cost information:

(1) Must be verified upon request from Federal agency.

(a) Verification must be based on testing by an independent testing entity using (i) BEES analysis or (ii) either a third-party analysis or an in-house analysis using ASTM D7075 standard for evaluating and reporting on environmental performance of biobased products, including life cycle costs.

c. Performance data, materials safety data sheets, etc.

d. Contact information.

Procurement Process:

1. The Federal agency identifies procurement need for a biobased product that falls within a designated item.

2. The agency conducts search for qualifying biobased products meeting this need; one tool is the informational Web site.

3. The agency issues a solicitation or uses another procurement procedure.

4. Manufacturers/vendors respond to the solicitation.

5. The agency gives preference to qualifying biobased products under a designated item.

a. Agencies have three exceptions to giving preference to biobased products:

(1) Not available within a reasonable time.

(2) Does not meet performance standards.

(3) Unreasonable price.

6. The agency makes a purchase.

The product information requirements contained in these guidelines are intended to establish standards to guide Federal agencies and manufacturers and vendors when such information is relevant in the context of a specific procurement. Other than certification of biobased content, Federal agencies should request information or verification of information only when such information will be of use to the agency in the context of the specific procurement. The discussion of product information in the guidelines is not intended to suggest that such information will be relevant to all procurements. Only self-certification of biobased content is required for all procurements of designated items.

III. Background

On December 19, 2003, USDA published in the **Federal Register** (68 FR 70730) a proposed rule to establish guidelines implementing the provisions of section 9002. As described in the proposed rule, the guidelines would be contained in a new 7 CFR part 2902, ''Guidelines for Designating Biobased Products for Federal Procurement.'' The new part would be divided into two subparts, ''Subpart A—General,'' and ''Subpart B—Biobased Product Eligibility for Federal Preference.'' Subpart A would address the purpose and scope of the guidelines and their applicability, provide guidance on product availability and procurement, define terms used in the part, and address affirmative procurement programs and USDA funding for testing. Subpart B would address communicating information on qualifying biobased products and characteristics required for obtaining designated item status, and would set out the initial categories of designated items and minimum content.

USDA solicited comments on the proposed rule for 60 days ending on February 17, 2004. USDA received 271 comments from 64 commenters by that date. The comments were from private citizens, consultants, individual companies, industry organizations and trade groups, nonprofit organizations, universities, a Member of Congress, and State and Federal agencies.

With few exceptions, the commenters supported the goals of section 9002 and the proposed guidelines, although nearly all of the commenters had specific suggestions for changes to the proposed guidelines or raised issues related to the implementation of the program. These suggestions and issues are addressed below by topic.

IV. Discussion of Comments

Many comments evidenced confusion regarding how the program would work. In an effort to address that confusion, USDA has reorganized the final rule into a more reader-friendly format. Along with the reorganization, the final rule also uses more descriptive section titles and more paragraph headings to enable readers to locate information efficiently. Because individuals commented on specific sections of the proposed rule, USDA is addressing the comments based on the section numbers of the proposed rule. However, the final rule section number is indicated after each proposed rule section number.

Applicability (Proposed Rule § 2902.2; Final Rule § 2902.3)

Paragraph (a) of Proposed Rule § 2902.2 (Final Rule § 2902.3(a)) explains that part 2902 applies to all procurements by Federal agencies of biobased products falling within items designated by USDA in this part, where the Federal agency purchases $10,000 or more worth of one of those items during the course of a fiscal year, or where the quantity of such items or of functionally equivalent items purchased during the preceding fiscal year was $10,000 or more. The $10,000 threshold applies to procuring agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger department or agency.

One commenter stated that USDA should clarify that the $10,000 trigger for purchasing biobased products is an agency-wide requirement. Similarly, another commenter stated that the $10,000 trigger for purchasing biobased products must be understood by Federal agencies to apply to the agency level and not an individual unit within an agency or credit card holder level.

In response to these comments, USDA is revising the text of § 2902.3(a) to change the word ''procuring'' to ''Federal'' and insert ''Federal'' in the phrase ''larger department or agency.'' The final rule provides that ''the $10,000 threshold applies to Federal agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger Federal department or agency.''

Some commenters raised points regarding the scope of the $10,000 threshold's applicability, with one commenter suggesting that USDA should educate agencies on how the $10,000 minimum purchase threshold is to be applied. With respect to who is making the purchases, one commenter stated that the $10,000 level is reasonable if it includes purchases made by contractors of the respective agency from outside vendors, and another commenter suggested that the guidelines should be applicable to State agencies and other governmental and quasi-governmental entities that receive Federal funding. With respect to what is being purchased, a fourth commenter stated that the $10,000 buying threshold for a product category is appropriate as long as it applies to the product category and not to the individual product.

With respect to educating agencies on how the $10,000 minimum purchase threshold is to be applied, USDA is developing a model procurement program that will incorporate an educational element. USDA anticipates that as the program enters its operational phase, the designation of items available for procurement will naturally tend to lend greater clarity to the program as it is practically applied. Section 9002 does not authorize extending the guidelines to State and local agencies using appropriated Federal funds to procure qualifying biobased items, or to persons contracting with such agencies with respect to work performed under such contracts. In response to the fourth commenter, the $10,000 threshold is determined at the item level, which is the level of designation, and not at the individual product level.

Some commenters recommended that Federal agencies be required to report all purchases, including government credit card purchases, subject to the $10,000 threshold on a single purchase or cumulative purchase of a single product type of $10,000 worth in the preceding year for the purposes of monitoring the program's impact and agency compliance. The resulting purchase reports could be made available in a searchable database on the program Web site to allow manufacturers to determine whether any of their products qualify for procurement preference and identify any opportunities or incentives to develop specific biobased alternatives.

As noted in the proposed rule, OFPP is required to prepare and submit a report to Congress every 2 years on the actions taken by Federal agencies in the implementation of the biobased product procurement program. OFPP's report will, of course, be a public document available for review by the public, including interested manufacturers. Also, a manufacturer seeking information that would help it to identify any opportunities or incentives to market or develop specific biobased alternatives may consult the Federal Business Opportunities Web site maintained by the GSA (*http://www.FedBizOpps.gov*), which provides, among other things, Federal agency recurring procurement forecasts.

One commenter stated that there should be ''flow down'' procurement preference to the subcontractor level, maintaining that subcontractors are often unaware of item preferences in Federal procurements and that such a ''flow down'' preference would ensure that small producers always get a bid opportunity. This comment is outside the scope of this rulemaking. It relates to the implementation of the procurement procedures for this program, which will be accomplished through the Federal Acquisition Regulation (FAR).

Paragraph (b) of Proposed Rule § 2902.2 (Final Rule § 2902.3(b) and § 2902.5(c)(1)) identifies two exceptions to the applicability of the guidelines, i.e., the guidelines do not apply to:

—Any procurement by any Federal agency that is subject to the regulations issued by the EPA under section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) (40 CFR part 247), to the extent that the requirements of the guidelines are inconsistent with those regulations; or

—The procurement of motor vehicle fuels or electricity.

One commenter noted that in addition to these two exceptions to the applicability of the guidelines, paragraph (e) of Proposed Rule § 2902.11 (Final Rule § 2902.5(c)(2)) also contains an exclusion from the program for products having mature markets. The commenter suggested that all the program exclusions be located in one place.

USDA agrees with the essence of this comment. To that end, items excluded from consideration for designation are consolidated in Final Rule § 2902.5(c). However, because an inconsistency with regulations implementing Section 6002 of the Solid Waste Disposal Act is an applicability factor, and not a blanket exclusion from this program or consideration for designation, USDA has retained that provision in the applicability Section, now Final Rule § 2902.3(b). Additionally, because the regulations implementing section 6002 of the Solid Waste Disposal Act are popularly known as the RCRA regulations or RCRA guidelines, USDA revised Final Rule § 2902.3(b) to acknowledge the connection between RCRA and the Solid Waste Disposal Act.

One commenter stated that the proposed rule was ambiguous as to whether the proposed procurement

requirements constitute a mandatory purchasing program or a preferential program. This commenter asked if agencies would be required to buy only biobased products unless one of the identified circumstances applies, or would the biobased program be subject to some sort of evaluative preference that goes into the procurement decision.

Section 9002 provides for preferred procurement of biobased products by Federal agencies, and the guidelines in this final rule reflect the statutory requirement that agencies must establish a procurement preference program. In developing the required preference program, Federal agencies are expected to adopt a policy that will maximize the purchase or use of biobased products to the extent practicable, with exceptions being made only when they: (1) Are not available within a reasonable time; (2) fail to meet performance standards set forth in the applicable specifications, or the reasonable performance standards of the Federal agency; or (3) are available only at an unreasonable price. To help clarify this and other aspects of the program, USDA will develop a model procurement policy and program for designated items to support its own procurement practices. The FAR also will be amended to implement the procurement aspects of the program.

One commenter stated preferred procurement programs like the proposed program are not the most effective mechanisms for changing or driving environmental behaviors. This commenter maintained that product claims regarding environmental and performance attributes could mislead public and private sector buyers and lead to less efficient, more costly, buying practices that would not assure more environmental benefits. Based on this position, the commenter recommended that USDA reconsider the ''must procure'' aspect of the program, which goes beyond simply encouraging new markets and could lead to undue substitution of viable products.

Section 9002 sets the basic parameters for this program. USDA must consider the economic and technological feasibility of using items, including life cycle costs, in designating items under this program. Additionally, vendors must provide information about product environmental and public health benefits, if so requested by the procuring official (see Final Rule §§ 2902.6 and 2902.8).

In most situations, self-certification should be satisfactory for Federal agencies. Manufacturers and vendors are expected to verify this information only in specific procurements where a Federal agency expressly requires verification of environmental benefits, public health benefits, or life cycle costs. Such information must be verified using an analytical method authorized in these guidelines. USDA, through these guidelines, requires verification with (a) a third-party test using the NIST Building for Environmental and Economic Sustainability (BEES) analytical tool or (b) either a third-party or an in-house test using the ASTM International (ASTM) standard for evaluating and reporting on environmental performance of biobased products, including life cycle costs. Both BEES and the ASTM standard are in accordance with International Organization for Standardization (ISO) standards, are focused on testing of biobased products, and will provide the life cycle assessment and life cycle cost information Federal agencies might require. Such information will empower the procuring official to consider all relevant factors and make determinations that best meet the Federal agency's needs.

USDA Guidance on Item Availability and Procurement (Proposed Rule § 2902.3; Final Rule § 2902.6)

Proposed Rule § 2902.3 (Final Rule § 2902.6) contained a discussion of the voluntary Web-based information site USDA intends to maintain for manufacturers and vendors of designated items produced with biobased products and Federal agencies. Through this Web site, USDA intends to provide access to information as to the availability, relative price, performance and environmental and public health benefits of the designated items. In the proposed rule, USDA solicited comments on the kinds of contact and product information that should be made available on the Web-based information system, as well as comments on the appropriate components of a model procurement program for biobased items.

With respect to the model procurement program, one commenter asked that, in the final rule, USDA better spell out how it will use its model procurement program or other assistance to help other Federal agencies in complying with section 9002. One suggestion made in this vein by two commenters was that USDA should provide sample solicitation and contract language that Federal agencies can insert into support services solicitations and performance-based contracts.

USDA is in the process of developing the model procurement program referred to in the proposed rule. It is the USDA intention to have the model procurement program in place prior to designation of the first items under the program. The USDA Office of Chief Economist has forwarded these comments to USDA Departmental Administration for its consideration in developing the model procurement program. With respect to the provision of sample solicitation and contract language, this comment and many similar comments reflect a misunderstanding of how these requirements will be implemented into the Federal procurement framework. To address this point in the guidelines, USDA added a new paragraph (a) in Final Rule § 2902.4 stating that: ''The Office of Federal Procurement Policy, in cooperation with USDA, has the responsibility to coordinate this policy's implementation in the Federal procurement regulations. These guidelines are not intended to address full implementation of these requirements into the Federal procurement framework. This will be accomplished through revisions to the Federal Acquisition Regulation.'' The USDA Office of Chief Economist has forwarded these comments to USDA Departmental Administration for its consideration in developing the model procurement program.

One commenter was concerned that the program's procedures are too complicated for acquisitions under the Simplified Acquisition Threshold as defined in § 2.101 of the Federal Acquisition Regulation. This commenter was also concerned that procurement automation efforts would be negatively affected due to the potential need to manually procure biobased items. This comment is outside the scope of this rulemaking. It relates to the implementation of the procurement aspects of this program, which will be accomplished through the FAR.

One commenter, noting that procuring agencies will be looking for articles such as truck bed liners and chairs, not ''molded plastics and composites,'' recommended that the program Web site include links so that products that fall under designated item groupings can be cross referenced or displayed by product categories in a manner that will be useful to Federal buyers. USDA appreciates the emphasis on purchasing of end products and will take that into account in future item designation. USDA intends to design the program Web site to be as user-friendly as possible, which would include providing features such as those described by the commenter.

Two commenters suggested that USDA should work closely with the Biobased Manufacturers Association

(BMA) and use BMA's ''Biobased Supercenter'' as a model for the USDA Web-based information center. One of these commenters also suggested that USDA work with BMA to coordinate product sub-categories, classes, and codes.

USDA will work to identify opportunities to coordinate its efforts under the biobased preference program with the efforts of other public and private entities with which the program has shared or overlapping interests.

One commenter noted that procurement agencies such as the Defense Logistics Agency (DLA) are tasked with purchasing materials identified by their customers as necessary to perform the customers' mission and stated that, while DLA and similar agencies can facilitate making alternative products available and visible, the decision on product choice will rest with the end user. This commenter recommended that the final regulations provide that customers (end users) should specify biobased products when ordering from Federal Supply Schedule or prime vendor type contracts.

Section 2902.4(c) in this final rule provides that after the publication of each designated item, Federal agencies that have the responsibility for drafting or reviewing specifications for items procured by Federal agencies shall ensure within a specified time frame that their specifications require the use of that item composed of biobased products, consistent with the guidelines. USDA will specify the allowable time frame in each designation rule.

The proposed rule preamble stated, ''Information on relative price, performance, and environmental and public health benefits that USDA is required to provide to Federal agencies will be gathered from manufacturers and vendors at the individual product level. This information, to be of maximum value to Federal agencies in making procurement decisions, must be considered at an individual product level.'' One commenter objected to the notion of gathering environmental and public health information directly from vendors of biobased products. Instead, this commenter stated, USDA must establish a set of standards that must be met by vendors who want their products to qualify. The commenter asserted that, to be truly useful, those standards must address safety and health effects on workers, performance, costs (of purchase, use, and disposal), and environmental impact.

As noted in the proposed rule, we intend to gather information on the relative price, performance, and environmental and public health benefits of specific products from industry using a Web site to which manufacturers and vendors of products that fall within designated items will be invited to voluntarily provide information, including availability of the products with biobased content that they offer to Federal agencies. Final rule § 2902.6(a) also includes biobased content among the information to be provided on the Web site. The Web site will employ a standardized format with interactive capabilities that will permit manufacturers and vendors to enter information into the Web site. Final rule § 2902.6(a) clarifies that the Web site will provide instructions for the posting of information. USDA will periodically audit the information displayed on the Web site and, where questions arise, contact the manufacturer or vendor to verify, correct, or remove incorrect or out-of-date information. In addition, USDA added to Final Rule § 2902.6(a) a general requirement that manufacturers and vendors, when requested, be able to verify any relevant product characteristic information provided to Federal agencies. USDA believes that these procedures, along with the fact that the designation process for each item will provide USDA and the public with an opportunity to consider the economic and technological feasibility, including life cycle costs, of items and the types of products that would fall within each item grouping, will ensure that the factors identified by the commenter are adequately considered.

Definitions (Proposed Rule § 2902.4; Final Rule § 2902.2)

With respect to the definition of biobased product, one commenter noted the use of the term ''renewable domestic agricultural materials'' and asked for clarification of the ''domestic'' qualifier. Does it refer to the origin of the agricultural materials, or to where the agricultural materials were turned into usable feedstock? The commenter stated that agricultural materials are sourced from all around the world, and that producers may be unable to certify that a particular raw material is ''domestic.'' On this same subject, one commenter noted that in section 9002, the qualifier ''domestic'' appears to apply only to renewable agricultural materials, and not to biological products, and asked that USDA clarify whether that is indeed the case.

The statutory definition refers to ''biological products or renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials.'' 7 U.S.C. 8101(2). USDA considers the qualifier ''domestic,'' as well as the qualifier ''renewable,'' to apply to both agricultural materials and forestry materials. Given that the statute refers to the materials themselves and not to, for example, domestically processed materials, USDA construes an intent to promote the use of U.S. origin agricultural and forestry materials.

Also with respect to the definition of biobased product, one commenter noted there was no reference to products manufactured primarily from ''naturally occurring microorganisms'' and asked if such products were being considered for inclusion in the program. To the extent that these products would be composed in whole or in part of biological products, such products would fall within the definition of biobased product.

One commenter stated there appeared to be an inconsistency between the definition of ''biobased content'' and the provisions of Proposed Rule § 2902.11(d)(1) (Final Rule § 2902.7(c)). The proposed definition of ''biobased content'' stated, in part, ''[t]otal product weight may be calculated exclusive of water or other inactive ingredients, fillers and diluents,'' while Proposed Rule § 2902.11(d)(1) stated ''[b]iobased content shall be determined based on the weight of the biobased material (exclusive of water and other non-active ingredients, fillers, and diluents) divided by the total weight of the product and expressed as a percentage.'' The commenter stated it was confusing as to whether total product weight is determined with or without inactive ingredients, including inorganic materials. On this same subject, another commenter stated that, in order to realistically promote the introduction of biobased products, the biobased content should—not ''may'' as in the definition—be defined exclusive of water, pigments, fillers, rheology modifiers, additives, and other inactive materials.

USDA agrees that the definition of ''biobased content'' needs clarification. In order to be consistent with the ASTM International Radioisotope Standard Method that USDA is requiring for determining and certifying biobased content, the term ''biobased content'' is defined in this final rule as the amount of biobased carbon in the material or product as a percent of the weight (mass) of the total organic carbon in the product. This calculation excludes all inorganic material in the product. USDA similarly revised Final Rule § 2902.7(c) to be consistent with the revised definition in Final Rule § 2902.2.

One commenter suggested that, to eliminate confusion, a definition of ''biodegradable'' should be added to the definitions section of the guidelines, as well as a note elsewhere in the guidelines that a biobased product is not necessarily a biodegradable product, *i.e.*, that biodegradability is a characteristic that must be addressed and qualified separately.

As biodegradability is a characteristic that will be a consideration in the designation of some items but not others, USDA does not think that it is necessary to add a definition of the term in this final rule. USDA will, however, propose to define the term in a future rulemaking when it is appropriate in the context of the item or items being considered for designation, which will give the public an opportunity to comment upon the proposed definition.

The same commenter suggested that a definition of ''total manufactured value'' be added to the guidelines to help clarify the use of the term in Proposed Rule § 2902.11.

As discussed later in this document, USDA has removed the ''5 percent of total manufactured value'' criterion from the guidelines in this final rule. Thus, it is not necessary to define the term.

One commenter stated that the definitions in the final guidelines should be inclusive rather than exclusive, thus food crops and food waste should have equal footing and utilization of agricultural and animal waste should be given equal, if not special, consideration over virgin agricultural food crops.

USDA considers the definitions in the guidelines to be inclusive. The statute and the guidelines focus on promoting the use of biobased products generally, without special emphasis on any particular class of biobased product.

In addition to the above changes made in response to specific comments, USDA is making several other minor technical or stylistic changes to the definitions of ''Biobased product,'' ''Designated item,'' and ''Sustainably managed forests.'' USDA is substituting ''USDA'' for ''Secretary'' in the definition of ''Biobased product'' to reflect the fact that the Secretary has delegated this authority within USDA and need not make such determinations personally. USDA revised the definition of ''Designated item'' to replace the term ''category'' with ''generic grouping'' because the use of the term ''category'' in the proposed rule generated confusion. In that same definition, USDA added ''biobased'' to modify ''products'' to clarify that the generic group was of ''biobased products.'' Also in that definition, because of the reorganization from the proposed rule to the final rule, USDA replaced the reference to ''§ 2902.12'' with ''subpart B.'' Regarding the definition of ''Sustainably managed forest,'' USDA added ''Refers to the'' at the beginning of the definition. Finally, in addition to these minor changes, USDA wants to clarify the origin of the definition of ''Small and emerging private business enterprise.'' That definition is based on the USDA Rural Business Service definition of the same term used in the Rural Business Enterprise Grant Program (*see* 7 CFR 1942.304).

Preferred Procurement Program (Proposed Rule § 2902.5(b); Final Rule § 2902.4(b))

Under Proposed Rule § 2902.5(b) (Final Rule 2902.4(b)(1)), agencies would be required to develop a procurement program that will assure that products that fall within designated items composed of biobased products will be purchased to the maximum extent practicable, consistent with applicable provisions of Federal procurement laws. Such programs would provide for preferential purchasing of products that fall within designated items unless the items are not available within a reasonable time, fail to meet performance standards, or are available only at an unreasonable price.

Several commenters focused on the ''unreasonable price'' criterion. Some of the commenters simply stated that USDA must provide guidance to Federal agencies as to what constitutes an ''unreasonable price'' or, conversely, what a ''reasonable price'' would be. Other commenters suggested that USDA should formulate a quantifiable ''allowable premium'' that procurement officials may pay, similar to that allowed for the purchase of recycled paper, that takes into account the socioeconomic and environmental benefits of using biobased products instead of petrochemical or mineral products. Flat 10, 15, and 20 percent premiums were suggested, as was a one percent premium for each 10 percent of biobased content.

The reasonable/unreasonable assessment, which the statute and the guidelines offer for consideration with respect to both the price of a product and the amount of time in which it would be available, is an assessment that USDA thinks must be made by the procurement official in the context of a specific procurement. Through the biobased program Web site and other initiatives, USDA will attempt to provide as much relevant information as possible for those procurement officials to consider. In the end, however, it will be agency procurement officials, acting in accordance with their agencies' particular procurement programs and the FAR, who will have to decide how to best meet the procurement needs of their agencies.

Other commenters sought a greater emphasis on value, rather than price. One of those commenters suggested that Federal agencies should be required to purchase biobased products despite initial price differentials, unless they can demonstrate through a full life-cycle analysis that the non-biobased product is a better value. Another commenter stated that USDA should clarify, quantify, and incorporate the concept of ''best value'' in its guidelines for Federal purchasing. In identifying the ''best value,'' some commenters stated, USDA should quantify the benefits of creating a new economic sector in rural America, the environmental benefits of using biobased products, and the national security and economic benefits of reduction of dependence on imported fossil fuels. One of these commenters concluded by suggesting that information by suppliers that documents ''best value'' should be included on the program Web site and a maximum allowable premium for biobased products should be set at 10 percent over a non-biobased alternative after a best value comparison.

The above comments relate to the implementation of the procurement aspects of this program, which will be accomplished through revisions to the FAR. The law provides the ''unreasonable price'' exemption, but application of this exemption will likely be based on a comparison of product price, price of alternative products, life cycle costs, and other benefits. In many, perhaps most, cases this will involve nonquantifiable determinations or determinations that can only be made by the procuring agency. Therefore, USDA believes that the degree to which such factors are incorporated into the procurement system can best be addressed through the implementing regulations in the FAR.

One commenter was concerned that the proposed program may be too cumbersome and too easily circumvented by unwilling procurement specialists. Similarly, other commenters were concerned that price and availability considerations may provide loopholes allowing purchasing agents to circumvent the original intent of section 9002 and suggested that exceptions to the purchasing requirement should be kept to a minimum. Some of these commenters stated that USDA needs to

provide explicit guidance to agencies to ensure that agencies do not use price to avoid their obligation to ''buy biobased,'' with one commenter stating that cost, in and of itself, is no excuse not to purchase biobased products. These commenters suggested that USDA guidance provide for the consideration of a variety of factors, such as product lifespan, energy savings, reduced disposal costs, reduced health and safety costs, environmental benefits, and compliance with other governmental ''green'' initiatives.

The guidelines in this final rule reflect the statutory parameters for making procurement decisions. That is, agencies must give a preference to designated biobased items unless the items:

—Are not reasonably available within a reasonable period of time;
—Fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or
—Are available only at an unreasonable price.

In addition to the statutory parameters, USDA has set forth recommended procurement practices in these guidelines. Those recommended procurement practices include acceptable standards for determining biobased content and product attributes. USDA encourages procurement officials to consider a product's life cycle costs and environmental and public health benefits when appropriate in the context of a specific procurement, but USDA is not in a position to mandate consideration of and establish specific qualifying standards for all possible products for all procurements.

Proposed Rule § 2902.5(a) (Final Rule § 2902.4(c)) stated, in part, that ''Within 1 year after the publication date of each designated item, Federal agencies that have the responsibility for drafting or reviewing specifications for items procured by Federal agencies shall ensure that their specifications require the use of designated items composed of biobased products, consistent with the guidelines in this part.'' One commenter offered that it may be possible for agencies to conduct a review of their specifications within the specified year, but that the development of new or revised specifications resulting from such reviews may not be possible within that time frame.

USDA expects that the required reviews and revisions of specifications will be an ongoing process, and certainly not a one-time effort that would overwhelm most agencies. USDA agrees with the commenter to the extent that the comment expresses that the one-year time frame might not be appropriate in all instances. To that end, USDA has revised Final Rule § 2902.4(c) to remove ''Within 1 year'', insert ''within a specified time frame'', and indicate that ''USDA will specify the allowable time frame in each designation rule.''

One commenter stated that the guidelines need to take into account the fact that more Government purchasing organizations are using methods involving long-term contracts, often in the 5- to 10-year range, in order to ensure supply continuity and realize savings. The commenter pointed out that some items that may be designated in the future will likely have non-biobased competition that is already on a long-term contract, and that the guidelines need to provide some flexibility in such cases, as changing those contracts would entail substantial time, effort, and costs. Along these same lines, one commenter stated that biobased procurement should become a mandatory feature of any new contracts or contract renewals, but simply encouraged in the context of existing contracts. These comments relate to the implementation of the procurement aspects of this program, which will be accomplished through the FAR.

Funding for Testing (Proposed Rule § 2902.6; Final Rule § 2902.9)

As discussed in the proposed rule, section 9002 provides to USDA $1 million per year for each of the fiscal years 2002 through 2007 to support the testing of biobased products to carry out the provisions of the section. Section 9002 further provides that USDA, at its discretion, may ''give priority to the testing of products for which private sector firms provide cost sharing for the testing.'' In the proposed guidelines, § 2902.6 (Final Rule § 2902.9) described the manner in which available funds for testing would be allocated and the priority-setting mechanism USDA would use to evaluate proposals for cost sharing. Under Proposed Rule § 2902.6(a) (Final Rule § 2902.9(a)), USDA will use these funds directly for biobased content testing and environmental/public health benefits testing using the BEES Analysis. Once USDA begins the cost sharing programs, USDA will provide cost sharing under Proposed Rule § 2902.6(b) (Final Rule § 2902.9(b)) for environmental and public health benefits testing, using the BEES Analysis, and for performance testing.

One commenter stated that while funding for testing was desirable, such funding should not be ''wasted on frivolous testing of products that are not already well down the path for qualification.'' This commenter stated that the funding should instead be directed toward simplifying the process so that the maximum number of vendors can perform the testing necessary to qualify products in the most cost-effective manner. The commenter encouraged USDA to use the funding to fill in limited data gaps to expedite designation of items, as discussed in the proposed rule.

USDA thinks that both the USDA-supported testing described in Proposed Rule § 2902.6(a) (Final Rule § 2902.9(a)) and the cost sharing criteria described in Proposed Rule § 2902.6(b) (Final Rule § 2902.9(b)) address directly the points raised by the commenter. With limited funding for testing, USDA is keenly aware of the need to maximize the usefulness of those resources.

With respect to the setting of priorities for the distribution of testing funds described in the proposed rule, one commenter encouraged USDA to give priority to products with a higher minimum biobased content, while another commenter stated that priority should be given to the funding of testing for products developed by small companies located in rural areas.

Once USDA has concluded that a critical mass of items has been designated, USDA will exercise its discretion to make cost sharing a more determinative factor in product testing. Paragraph (b)(3) of Final Rule § 2902.9 provides that cost-sharing proposals will be considered first for high priority products of small and emerging private business enterprises, which would include the small companies in rural areas identified by one of those commenters. Proposals for cost sharing will be prioritized, with rating points assigned based on the product's market readiness, the potential size of the market for that product in Federal agencies, the financial need for assistance of the manufacturer or vendor, the product's prospective competitiveness in the market place, and the product's likely benefit to the environment. If funds remain available, proposals from other than small and emerging private business enterprises will be considered, based on those same priority factors. These factors will allow USDA to give favorable consideration to products with higher biobased content and products developed by smaller companies.

In response to these and the previous comments, USDA reorganized and revised Final Rule § 2902.9(b)(2) and (3) to clarify these points. Final Rule

§ 2902.9(b)(2) and (3) make clear that USDA will use these criteria to rank the priority of both small and emerging private business enterprise proposals and other producer proposals. Final Rule § 2902.9(b)(3) also clarifies that USDA will consider first only ''high priority'' products of small and emerging private business enterprises before considering proposals for products of other producers of biobased items. In other words, after considering all ''high priority'' proposals for products of small and emerging private business enterprises, USDA will consider all remaining cost sharing proposals together, including both the remaining proposals for products of small and emerging private business enterprises and all proposals for products of all producers of biobased items. These clarifications help ensure that this framework will result in the efficient and cost-effective use of these funds to further the program objectives.

In addition, USDA made several minor technical revisions in Final Rule § 2902.9(b). In paragraph (b)(1), USDA revised ''testing of biobased products to carry out this program'' to reference the testing that would be funded under paragraph (b)(4) and the applicable testing standards from § 2902.8. The revised phrase reads ''life cycle costs, environmental and health benefits, and performance testing of biobased products in accordance with the standards set forth in § 2902.8 to carry out this program.'' USDA also revised paragraph (b)(4) to replace the first reference to BEES with the phrase ''life cycle costs and environmental and health benefits'' and to strike the second reference to BEES. These revisions are to make this section consistent with Final Rule § 2902.8, as discussed below.

One commenter recommended that USDA should provide opportunities for colleges and universities to gain the necessary funding to develop the capacity to conduct the performance, health effects, and environmental testing necessary for the designation of biobased products; in the future, these institutions could also perform the carbon dating and BEES analyses provided for by the guidelines.

USDA agrees that building such capacity would be consistent with the goals of section 9002. However, the funds made available under section 9002(j)(2) are ''to support testing of biobased products.'' These funds are not available for capacity building of colleges and universities, nor is the focus of section 9002 institutional capacity building. Within USDA, the Cooperative State Research, Education, and Extension Service (CSREES) mission includes capacity building. The Office of Energy Policy and New Uses (OEPNU) will discuss this comment with CSREES as part of overall USDA biobased program coordination.

Communicating Information on Qualifying Biobased Products (Proposed Rule § 2902.10; Final Rule § 2902.6)

As proposed, paragraph (a) of Proposed Rule § 2902.10 (Final Rule § 2902.6) would require that manufacturers be able to verify the biobased content in their products. The level of biobased content in a product would have to be determined using the ASTM International standard that is a Radioisotope Standard Method (D 6866) to distinguish between carbon from fossil resources and carbon from renewable sources.

Several commenters weighed in on the use of the ASTM International Radioisotope Standard Method for determining the level of biobased content in a product; however, only one of those commenters fully supported its use. While the one supportive commenter noted that the method can produce results in as little as 2 days at a cost of $305, many other commenters objected to the costs and delays that would be associated with the use of the method, especially with respect to products that are already being marketed. While several commenters referred to the testing as ''costly,'' other commenters simply stated that the costs associated with the testing were unknown and that USDA must provide more cost information before requiring such testing.

According to information USDA received from Iowa State University, which is conducting some testing under a cooperative agreement with USDA, test results could be expected in 2 to 4 weeks at a cost of $250 to $500 per sample, depending on the specific methodology used. USDA anticipates that each item designation will address minimum biobased content for that item. Therefore, manufacturers and vendors must know the biobased content of their products in order to know whether the products qualify under a designated item. Manufacturers and vendors must be able to certify that information to the procuring official. Adoption of a standard test method is necessary for the integrity of this program, providing a degree of certainty for Federal agencies, manufacturers, and vendors. A standard test method informs manufacturers and vendors of the standard against which their products and their competitors' products will be judged, and Federal procuring officials of the standard to apply, should questions arise.

It is notable that no commenters proposed alternative standard test methods. Because use of a standard test method is essential for successful program implementation, USDA considers the projected costs and testing periods associated with the ASTM International Radioisotope Standard Method to be reasonable. Additionally, given the benefits that could be expected to accrue to a manufacturer or vendor as a result of a product being eligible for the procurement preference, it would appear that a $250 to $500 investment for testing would be viewed as a worthwhile business investment.

In response to comments regarding the expense and time required for biobased content, BEES, and performance testing of specific products (the latter addressed in more detail below), USDA revised the final rule to provide alternatives to BEES, simplified the provision addressing biobased content test data for products that are essentially the same formulation and extended this concept to environmental and health effects and life cycle cost test data and in part to performance test data. Final Rule §§ 2902.7(d) and 2902.8(a) clarify that biobased content and BEES or the other ASTM biobased product standards test data need not be brand-name specific for products that are essentially the same formulation. Regarding performance test data, Final Rule § 2902.8(b) leaves to the discretion of the procuring official whether such test data must be brand-name specific. The different standard for performance test data recognizes that even minor changes to a formulation may impact critical performance characteristics, and thus the sufficiency of test data for a product that is essentially the same formulation must be determined on a case-by-case basis by the procuring official. Proposed Rule § 2902.11(d)(2) had presented this concept in a more confusing manner and as limited to biobased content testing.

Several commenters suggested that USDA should accept manufacturers' self-certification as to biobased content levels, and that the ASTM International Radioisotope Standard Method should be required only if a product's biobased content level was challenged by an agency, competitor, or consumer. To support the idea of self-certification, two of these commenters noted that RCRA regulations (40 CFR part 247) do not require affirmative tests to determine if wastes meet the toxicity characteristics of hazardous waste.

Under Proposed Rule § 2902.10(a) (Final Rule § 2902.6(a), § 2902.7(a), and

§ 2902.8) manufacturers and vendors are expected to provide relevant information to Federal agencies, upon request, with respect to product characteristics. This requirement is essentially the same as the self-certification described by the commenters. The same paragraph goes on to provide that manufacturers and vendors must be able to verify the biobased content in their products, and that the ASTM International Radioisotope Standard Method must be used to determine the level of biobased content in the product. Because biobased content is a key element in the statutory and regulatory framework, procuring officials, when necessary, must be able to request verification of biobased product content of products offered under specific procurements. Statutory requirements of this program differ from those of the program noted by the commenters. To reaffirm this position, USDA revised Final Rule § 2902.7(a) to state that ''Upon request, manufacturers and vendors must provide'' such verification information in lieu of the text in Proposed Rule § 2902.11(b) that ''Federal agencies and USDA may request''. USDA encourages Federal agencies to request such verification only when necessary.

Several commenters were concerned about the method itself. Some noted that the Radioisotope Standard Method had not yet been approved by ASTM, and stated that only consensus standards should be used. Other commenters stated that the test is new and untried and the results may not reflect actual biobased content. Two of these commenters stated that the $^{14}C/^{12}C$ ratio measurement must be used with considerable caution, if at all; if it is required, USDA must allow for test error in setting the minimum content for a product.

The Radioisotope Standard Method is now an ASTM consensus standard (ASTM D 6866), thus USDA is confident that it has moved beyond the ''new and untried'' stage. USDA added the ASTM number in the text of Final Rule § 2902.7(c). With respect to the potential for test errors, this ASTM method, like any other test, should produce results that are repeatable, and thus could be verified in the event that a manufacturer or vendor disagreed with the level of biobased content indicated in the test results.

As proposed, paragraph (b) of § 2902.10 (Final Rule 2902.8(a)) would require manufacturers and vendors to use the BEES analytical tool to provide information on life cycle costs and environmental and health benefits to Federal agencies, when asked.

Some commenters stated that the regulations should provide for the use of other appropriate analytical tools for generating life cycle costs information in addition to BEES, including life cycle costs assessments conducted by product manufacturers or their contractors. Three of these commenters appeared to be basing this suggestion on the existence of other analytical methodologies, with two suggesting ISO14040 and the third suggesting that the EPA Environmental Technology Verification (ETV) Program could be used in place of, or as a supplement to, BEES. Two other commenters suggested that additional tools should be available because, while BEES may be appropriate for some categories and items, it may not be the best alternative for all of them, with one commenter pointing to the differences between traditionally produced biobased products and those produced using biotechnology. One of those commenters stated that while quantitative methods are needed to support environmental attributes, producers should have the flexibility to choose the most appropriate tools, as long as they are scientifically based; recognized by standards organizations, such as ISO or ASTM; and include peer review to ensure accuracy. In a similar vein, one commenter suggested that manufacturers should be able to substantiate claims related to biobased product content and environmental performance themselves using ISO-compliant methodologies, with the BEES life cycle model then being applied to determine life cycle costs.

USDA, in response to public comments, has concluded that alternative methods may be used to verify environmental and health effects and life cycle costs. Manufacturers and vendors must provide the necessary information by using either (a) the BEES analytical tool along with the qualifications of the independent testing entity that performed the tests, or (b) either a third-party or an in-house conducted analysis using ASTM D7075, the standard for evaluating and reporting on environmental performance of biobased products, including life cycle assessment and cost analysis for biobased products. Both BEES and the ASTM standard are in accordance with ISO standards, are focused on testing of biobased products, and will provide the life cycle assessment and life cycle cost information Federal agencies might require. USDA believes the above noted tests are particularly well suited for the needs of this program.

Several commenters objected entirely to the required use of BEES. The reasons given were: (1) BEES may require the release of confidential trade secret information; (2) BEES testing will be an undue burden on producers, especially small producers, which may eliminate some operations from participation in the program; and (3) other Federal programs, such as RCRA, do not require such testing. One commenter stated that manufacturers should be allowed to use BEES if they believed it would be useful to their own marketing efforts, but that BEES should not be required generally.

In response to these concerns, USDA offers the following: (1) The security of confidential trade secret information will be an issue between the manufacturer or vendor and the laboratory performing the BEES analysis. USDA expects that the contractual agreement between the two involved parties would address the issue of business information security. (2) In accordance with the procedures outlined in Final Rule § 2902.9, USDA will provide some funding for BEES, ASTM environmental testing, and performance testing of individual products with biobased content, with priority being given to products of small and emerging private business enterprises. (3) In designating items, section 9002 requires USDA to consider the economic and technological feasibility of using the items, including life cycle costs. Such life cycle costs can be ascertained through the use of the BEES analytical tool and the ASTM environmental testing standard.

Several commenters objected to the required use of BEES for biobased products—a requirement termed a burden by some—when there was no similar requirement for competing non-biobased products. These commenters questioned the usefulness of BEES-generated life cycle and other information in the absence of comparable information related to competing products, with one commenter stating the goal of such testing should be to compare biobased products with petroleum-based products. Another commenter suggested that some of the testing funds that would be available should be used to test established, competing products. A third commenter stated USDA should eliminate the use of BEES analyses unless competing non-biobased products are required to have BEES analyses. Finally, one commenter recognized that BEES would result in a level playing field for biobased products, but stated that biobased product manufacturers and vendors should not be required to provide more

data than other manufacturers and vendors offering products for sale to Federal agencies.

USDA agrees that it would be quite useful to be able to make a point-by-point comparison, using the same standards of measure, between a biobased and a non-biobased product prior to making a procurement decision. However, under section 9002, USDA has neither the authority to require nor the funding for the testing of non-biobased products. Even absent comparable data for non-biobased products, USDA thinks that BEES test data, or test data from the ASTM standard for evaluating and reporting on environmental performance of biobased products and the ASTM standard for life cycle cost analysis, for biobased products will have utility for the procuring officials in making procurement decisions. Test data from these two alternative sources will facilitate procuring official consideration of non-price factors, such as life cycle costs, in making procurement decisions. To that end, the final rule retains the requirement that manufacturers and vendors provide such information upon request. However, USDA encourages Federal agencies to request verification only when necessary.

Regarding the comment advocating allowing manufacturers and vendors to perform environmental attribute tests in-house, USDA is requiring in Final Rule § 2902.8(a) only that, when requested to provide environmental and health effects and life cycle test data, manufacturers and vendors use a third-party BEES analysis or either a third-party or in-house analysis using the ASTM standard for evaluating and reporting on environmental performance of biobased products. Several commenters questioned the need for manufacturers to have BEES testing conducted at the product or item level. Most of these commenters stated that BEES should not be required for each product, with some suggesting that one generic product should be allowed to serve as a standard bearer for a group of products and others suggesting that qualifications should be done by product formulations within a category.

As described in the proposed rule, USDA will compile information on the economic and technological feasibility, including life cycle costs, of biobased items from industry. Once this information is available on a sufficient number of such products within an item, the information will be evaluated and extrapolated to the generic item level for use in meeting the requirements of section 9002 that such information be considered in designating an item for preferred procurement. USDA added a new paragraph to that effect in Final Rule § 2902.5(b) in order to clarify this concept in the guidelines. Additionally, as discussed above, in the case of products that are essentially the same formulation, but marketed under different brand names, the manufacturer or vendor could apply test data from one product to other such products.

Other commenters stated that USDA itself should use BEES to provide generic information at the item level, perhaps using the testing funding discussed in Final Rule § 2902.9. Another commenter was concerned that the designation of items will be delayed due to the reluctance of manufacturers to pay the costs associated with a BEES analysis only to have other manufacturers use the resulting information for their own products, getting, in essence, a ''free ride.''

USDA is already using BEES testing to provide generic information at the item level, and is funding BEES testing for those products that it has identified as representing the best opportunity to designate items expeditiously. USDA does not think the ''free ride'' issue brought up by one commenter necessarily would discourage a manufacturer from proceeding with BEES testing or any other efforts that might be required under the program as long as that particular manufacturer had concluded that the benefits of program participation outweighed the costs.

As proposed, § 2902.10(c) (Final Rule § 2902.8(b)) would require that, in assessing performance of qualifying biobased products, Federal agencies rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards. Such testing must be conducted by a third party ASTM/ISO compliant test facility.

With respect to performance testing, one commenter cautioned that USDA needs to recognize the difference between performance specifications and product specifications. For example, motor oil has a Society of Automotive Engineers (SAE) standard, which is a product specification, not a performance specification. Thus, saying that a biobased motor oil should meet the SAE standard may not be applicable unless that standard was based on performance testing.

USDA is aware of that distinction and will work with manufacturers and testing facilities to ensure that the appropriate criteria are applied with respect to performance testing.

Another commenter was concerned that trying to determine whether a company's product meets the performance standards could add unacceptable lead-time to procurements, if the company is not required to have the necessary testing completed prior to its submission of an offer.

USDA expects that the program Web site will be the primary interface between procuring agencies and the manufacturers/vendors of biobased products; the latter will be expected to provide sufficient information regarding their products—including performance data—when they post their products on the website. This comment also relates to the implementation of the procurement aspects of this program regarding which USDA defers to OFPP.

Several commenters objected to the third-party performance testing requirements. One of those commenters stated that such testing was not required by section 9002. Several other commenters suggested that third-party testing should not be a general requirement, with manufacturers being required only to offer their own evidence and proof that their products meet or exceed Federal agency requirements. One commenter stated that third-party testing should be required only for critical applications (e.g., required for specialized lubricants, but not for landscaping material). Several other commenters suggested that testing should be required only in the event of a challenge to a manufacturer's claims.

While section 9002 may not specifically require testing, the statute requires USDA to provide such information to agencies. In this final rule, USDA has retained the requirement for manufacturers and vendors to use test results obtained from testing against industry accepted performance standards (e.g., ASTM, ISO, Military Specifications, etc.) for their product. While performance testing is not required for program participation, the final rule requires that manufacturers and vendors provide this information to Federal agencies when requested. USDA encourages Federal agencies to request such information only when necessary. USDA revised Final Rule § 2902.8(b) to require that ''Results from performance tests completed must be available to Federal agencies upon their request, along with the qualifications of the testing laboratory.'' USDA encourages third-party testing to support the integrity of this program.

Characteristics Required for Obtaining Designated Item Status (Proposed Rule § 2902.11; Final Rule § 2902.5 and § 2902.7)

As proposed, paragraph (a) of § 2902.11 would require that all qualifying items under the program have at least five percent of their total manufactured value (measured after manufacture at the location of manufacture) made up of biobased product(s). Proposed paragraph (b) (Final Rule § 2902.7(b)) went on to explain that the minimum biobased content requirements for specific items, once designated, refer to the biobased portion of the product, and not the entire item. The specific product requirements would be in addition to the five percent total manufactured value requirement in proposed paragraph (a).

Several commenters addressed the proposed ''five percent of total manufactured value'' provision. Some of those commenters requested that USDA clarify the standard, stating that readers may confuse five percent total manufactured value with five percent biobased content. Other commenters asked how the standard would be applied to components versus completed end products. One commenter asked why USDA would require two certifications from manufacturers and vendors—i.e., a self-certification with respect to the five percent of total manufactured value and a third-party certification with respect to the biobased content of a specific product—when the latter alone should suffice. Finally, one commenter stated that manufacturers and vendors do not understand the need for the five percent manufactured value test, noting that section 9002 did not require such a test and that the value will be difficult to determine.

USDA has reviewed the proposed ''five percent of total manufactured value'' provision and, after considering the comments received on the subject, has decided to remove that provision from the guidelines in this final rule. USDA retained in Final Rule § 2902.7(b) the explanation that minimum biobased content requirements refer to the biobased portion of a product, and not the entire product. However, in light of the removal of the ''five percent of total manufactured value'' provision and the revised definition of ''biobased content'' (discussed above), USDA revised Final Rule § 2902.7(b) to add the phrase ''Unless specified otherwise in the designation of a particular item,'' in order to preserve USDA flexibility should application of the minimum biobased content requirements to only the biobased portion of a product be inappropriate or insufficient for a particular item contemplated for designation. The proposed rule to designate an item will address biobased content and provide an opportunity for public comment.

Proposed paragraph (c) of § 2902.11 (Final Rule § 2902.8(a)) deals with verifying the biobased content of products by third party ASTM/ISO compliant test facilities using the ASTM International Radioisotope Standard Method. The comments received regarding the ASTM standard are discussed previously above. Similarly, the comments received regarding proposed paragraph (d) (Final Rule § 2902.7(c) and (d)), which deals with determining biobased content of products, are addressed above in the discussion regarding the definition.

Under proposed paragraph (e) of § 2902.11 (Final Rule § 2902.5(c)(2)), products having mature markets would be excluded from the program. For purposes of this program, a product would be considered to have a mature market if it fell within any of the following groups:

—Silk, cotton and wool garments, household items, and industrial or commercial products unless made with a substantial amount of biobased plastic product.
—Wood products made from traditionally-harvested forest materials.
—Products having significant national market penetration prior to 1972.

USDA received comments both for and against the exclusion of products having mature markets. The commenters who supported the exclusion agreed that the intent of section 9002 was to aid the development of new and emerging markets, and not to focus on already mature traditional markets or articles that are inherently biobased. While the commenters who opposed the exclusion did not dispute that the focus should be on developing markets, they argued that such a goal should not necessarily mean that products having more established markets should be excluded from the program. To these commenters, the goal of section 9002 was to increase overall demand for biobased products, which leaves room for the inclusion of proven, existing technology in the program. In this vein, some commenters objected to the exclusion of wood and other products from the guidelines, stating that such exclusions fail to consider the overall societal benefits resulting from the use of biobased materials over petrochemical-based materials. With respect to the exclusion of products having significant national market penetration prior to 1972, one commenter stated that the age of a product is not necessarily an indicator of its market maturity, that the 1972 cutoff is arbitrary and possibly contrary to the goals of section 9002, and that the guidelines should offer a greater degree of flexibility.

The intent of section 9002, as described in the conference report accompanying FSRIA, ''is to stimulate the production of new biobased products and to energize emerging markets for those products.'' Given that, USDA finds that it is entirely appropriate for the guidelines to exclude products having mature markets from the program. However, after considering the comments received on the subject, USDA has amended the guidelines in this final rule by removing the proposed exclusions for ''silk, cotton, and wool garments, household items, and industrial or commercial products unless made with a substantial amount of biobased plastic product'' (Proposed Rule § 2902.11(e)(1)) and ''wood products made from traditionally-harvested forest materials'' (Proposed Rule § 2902.11(e)(2)). The exclusion of certain wood products was considered unnecessary in light of the definition of ''Forestry materials'' in Final Rule § 2902.2 as ''materials derived from the practice of planting and caring for forests and the management of growing timber. Such materials must come from short rotation woody crops (less than 10 years old), sustainably managed forests, wood residues, or forest thinnings.''

Further, USDA considered the likelihood that there are biobased products that have come full circle, i.e., products that were in widespread use at some point prior to 1972 but then supplanted by petroleum-based products. To account for this, USDA has changed the ''significant national market penetration'' criterion from ''prior to 1972'' to ''in 1972.'' As explained in the proposed rule, the oil supply and price shocks that began in this country around 1972 provided the impetus for sustained serious new development of biobased alternatives to fossil-based energy and other products; in addition to that new development, there also was a return to existing, perhaps neglected or underutilized, biobased products. USDA thinks that using 1972 as a point in time standard, rather than a dividing line between two eras, can provide for the designation of some items that would otherwise be excluded.

Items and Minimum Biobased Content (Proposed Rule § 2902.12; Final Rule 2902.5(a) and Subpart B)

As discussed in the proposed rule, § 2902.12 will contain a list of items that are designated for procurement preference, as these items are designated by rule making, and will provide the minimum biobased content for each listed item. Although USDA did not propose to designate any specific items in the proposed rule, USDA did present a number of items in the preamble of the proposed rule that it identified as illustrative of the items it intends to propose for designation for preferred procurement after USDA has sufficient information on availability of the items and the economic and technological feasibility of using such items, including life cycle costs.

One commenter noted that there was no time line provided in the proposed rule for the future designation of products and asked that USDA, in the final rule, provide a prioritized ''wish list'' ranking product types in order of strategic importance to the United States and the likelihood of their acceptance under the program assuming they meet requirements of competitiveness in cost, availability, and performance.

As noted above and in the proposed rule, USDA will be unable to propose specific items for designation until it has sufficient information on availability of the items and the economic and technological feasibility of using such items, including life cycle costs. Without such information, USDA cannot speculate as to the likelihood of the designation of any item under the program. Further, given that the program is still in its infancy, it would be premature to assign any ''strategic importance'' to specific items or classes of items. The rationale and process for the designation of each item will be detailed in the proposed rule to designate that item, and will be open to public comment. USDA notes, however, that it have already has begun the preliminary work necessary to initiate rulemaking to designate several items and hopes to have that rulemaking concluded before the end of the year.

In the proposed rule, USDA specifically solicited comments on the categories and items it presented, as well as on the reasonableness of the suggested biobased content percentages. USDA received numerous comments in response to that request, along with many suggestions for additional items, categories, and subcategories. USDA appreciates the many detailed suggestions and insights offered by the commenters regarding items and biobased content percentages, the standards and specifications that should be taken into account when designating particular items, and other technical considerations related to those items; USDA will fully consider that information as we move forward with the process of designating items. Because no items are designated in this final rule, USDA will not address any of the specific, item-oriented comments that it received. However, USDA also received a number of more general comments regarding item designations and biobased content; those comments are discussed below.

In the proposed rule, USDA presented the items contemplated for future designation as being grouped according to category, with each category consisting of one or more items; each item consists of specific products offered by manufacturers and vendors. That is, an item is made up of individual products and a category consists of items. One commenter objected to this manner of arranging products, claiming that Congress intended ''item'' to refer to an actual product purchased, not to a generic grouping of products as USDA has used the word. This same commenter pointed out that ASTM's ''Standard Guide for the Determination of Biobased Content, Resource Consumption, and Environmental Profile of Materials and Products'' (ASTM D 6852) proposed a classification scheme/decision tree for biobased materials and products and suggested that USDA adopt that or a similar approach for developing its classification framework. The commenter recommended that, to refer to the generic grouping, USDA should use the terms ''biobased product group'' and ''biobased material group,'' which would accommodate what appears to be USDA's intention to designate both end products and the materials used to produce end products.

USDA does not think that there is any conflict between the statute and the proposed guidelines with respect to the use of the term ''item.'' While the statutory phrase, ''the quantity of such items or of functionally equivalent items,'' could be read as to equate ''item'' as the guidelines use ''product,'' USDA finds that the end result of either approach would be the same, i.e., the designation process will result in specific products being identified for procurement preference. For the sake of clarity, USDA has amended the definition of ''designated item'' in this final rule by replacing the word ''category'' with ''generic grouping.'' As amended, the definition reads: ''A generic grouping of products identified in Subpart B that is eligible for the procurement preference established under section 9002 of FSRIA.'' For example, hydraulic fluid for stationary uses could constitute an item. Company ABC's branded hydraulic fluid could constitute a product.

Several commenters voiced other concerns regarding the items, categories, and minimum content levels presented in the preamble of the proposed rule. As noted in the proposed rule, the items and the indicated biobased content of items contained within the categories were based on a study conducted in 2002 for the USDA Agricultural Research Service by Concurrent Technologies Corporation (CTC).

Some commenters pointed to the age of the CTC study and stated it must be updated before it can be used as the basis for describing categories. These commenters stated that the study does not reflect the current availability of items and that the categories in the study were inconsistent with the categories in the proposed rule. One commenter suggested that USDA should convene a group of industry representatives and government purchasing agents to develop a list of categories and items that will be clear both to product manufacturers and purchasing agents. Several other commenters were concerned that neither the CTC study nor the information presented by USDA in the proposed rule offered any technical basis or justification for the minimum content levels that were offered. Without a well-documented, transparent, and strong technical basis for setting minimum biobased content levels, the proposed minimum content levels appear arbitrary.

The minimum content levels in the CTC study were based on data provided by industry, academic, and government experts. In the proposed rule, USDA did not propose to designate any items; rather, the presentation of the categories, items, and minimum biobased content levels was intended to stimulate the submission of comments in those areas. As USDA will designate items using notice-and-comment rulemaking procedures, items will not be designated without (1) an explanation of the rationale for designation of an item and its proposed attributes, including minimum content levels, and (2) an opportunity for public comment upon the proposed designation and supporting information.

One commenter suggested that a standard other than minimum content be used to qualify products under the rule. Specifically, this commenter suggested that USDA use a ''total

biobased content impact equation'' that would more adequately take into account: (1) The functionality of the biobased component of a product (i.e., is the biobased component key to the functionality or an add-on?); (2) the impact of use of the product on the consumption of petroleum stocks from the perspective of product composition; and (3) the impact on rural economies through the utilization of domestic agricultural inputs.

As a practical matter, USDA thinks that biobased content should be a primary consideration, given that section 9002 requires agencies to give procurement preference to items composed of the highest percentage of biobased products practicable. However, the statute requires USDA take into account product availability, technological and economic feasibility, including life cycle costs, in designating items. USDA is also required to provide information for Federal agencies use on availability, price, performance, and environmental and public health benefits.

Another commenter stated that USDA should not set minimum biobased content levels, which can have undesirable ''floor and ceiling'' effects (i.e., the merits of products with content below the minimum level would not be considered, and manufacturers would have little incentive to exceed the minimum level). Instead, USDA should simply require that the manufacturer post the biobased content level on the product.

Section 9002 provides that USDA will, where appropriate, recommend the level of biobased material to be contained in the procured product. The process of designating items would take into account the concerns of the commenter by ensuring that issues such as biobased content vs. performance are addressed in an open, transparent fashion.

One commenter stated that, in the interest of reconciling the minimum content levels presented in the proposed rule with the BMA's self-certification system already in place, USDA should adopt just four minimum standards (15, 36, 66, or 86 percent) to be applied as appropriate. This approach would reconcile the USDA minimums to BMA minimums with only minor adjustments in most cases to the USDA minimums presented in the proposed rule and allow for the use of the four content ratings already established by BMA and used by manufacturers (i.e., BMA–25 for products ranging from 15 to 35 percent biobased content, BMA–50 for the 36 to 65 percent range, BMA–75 for the 66 to 85 percent range, and BMA–100 for products that are 86 percent biobased or better).

While the idea of adopting an existing industry classification system is appealing, USDA is bound to consider the charge in section 9002 that each Federal agency which procures any items designated in such guidelines shall, in making procurement decisions, give preference to such items composed of the highest percentage of biobased products practicable. With that in mind, using only four content ratings would mean that agencies would be unable to capture the distinction between, for example, a BMA–50 rated product with 36 percent biobased content and one with 65 percent biobased content.

One commenter recommended that one product alone should be sufficient to establish an ''item,'' citing the infancy of the biobased industry and the likelihood that, at least initially, only a single product may be available that meets the necessary performance and other requirements of a particular application.

Given that the intent of section 9002 is largely to stimulate the production of new biobased products and to energize emerging markets for those products, USDA agrees with the commenter that the identification of even a single biobased product could serve to trigger the designation of an item.

One commenter suggested that the final rule should include a reasonable deadline for USDA to give manufacturers or vendors a decision on whether a product that a manufacturer or vendor has submitted to USDA for item designation has ''survived the filtering process,'' i.e., whether a particular product may be eligible or appropriate for designation. The commenter suggested a time frame not to exceed 30 days from the date of submission.

These guidelines do not establish a formal process for manufacturer or vendor initiation of designation of items. While USDA welcomes manufacturer or vendor suggestions, USDA has no formal process or deadlines to respond to such suggestions. USDA added the last sentence in Final Rule § 2902.5(a) to clarify this point. USDA will post on its Web site, *http://www.biobased.oce.usda.gov,* a pro forma list of possible items for designation. In developing this list, USDA will consider a number of factors, including, but not limited to, the cost competitiveness of an item, whether performance of the products within an item meet Federal requirements, availability of products within an item, interest by manufacturers in the preferred procurement program, and potential Federal demand for the product. USDA will be gathering information on a range of specific products that fall under an item to determine the certain characteristics of that item, to meet the statutory requirements that USDA consider availability of items and the economic and technological feasibility of using such items, including life cycle costs, when considering the designation of a given item. In this process, USDA will be seeking both that information and indication of interest in providing the information from manufacturers and vendors. To the extent that the commenter is asking USDA whether a specific product falls under a specific designated item, there is no filtering process. Where manufacturers and vendors believe their products fall under a designated item, they are free to assert coverage under the preferred procurement program when marketing the products to Federal agencies.

Two commenters urged USDA to designate only final products, not the components of those products. Both pointed out that Federal agencies purchase finished products, and suggested that designating the components of products would be confusing to purchasers and make it more difficult for them to ''buy biobased.''

Section 9002 states that, in its guidelines, USDA shall designate those items which are or can be produced with biobased products and whose procurement by procuring agencies will carry out the objectives of the statute. With that in mind, USDA agrees that the items designated should correlate to the degree possible with the products routinely purchased by Federal agencies.

One commenter urged USDA to, at least initially, focus its energies on designating items that are composed primarily of biobased material, rather than items that may have components that may have biobased content.

As noted earlier in this document, the first few years of the program will focus on identifying and testing those items that can be designated in the most expeditious manner possible. It is likely that those items will be indeed largely of the type described by the commenter.

On the subject of biobased components, one commenter cautioned against designating items that incorporate biobased feedstocks into non-degradable, non-durable applications. Such items, the commenter stated, would break the closed loop cycle that can be achieved by composting, necessitate the separation of such items from other

compostable materials such as food scraps, and create competition between such items and those items that are both biobased and biodegradable, which will only confuse the end users and harm the growth of the overall biobased sector.

USDA acknowledges the validity of the considerations raised by the commenter. In the course of designating items in the future, such considerations would play a role when compostability is a factor in the economic and technological feasibility of using such items.

Several commenters asked for clarification regarding the minimum content standard. One commenter stated that there were inconsistencies in the minimum content levels offered in the proposed rule, noting that a biobased polymer could qualify for preference when used as the sole component of an item in the plastics category, but not if it was used to produce synthetic fibers used in clothing or carpet. Another commenter used a similar example to frame the question: A minimum biobased content level is set for a durable film; is that content level for the durable film itself, or for the finished product that incorporates the durable film? Yet, another commenter further stated that USDA must make clear what products with biobased components qualify for preferred procurement.

The minimum content levels will apply to designated items. If the durable film in the one commenter's example is the designated item, then the minimum content level will apply to the durable film. If a finished product that incorporates that durable film is a designated item, then that product must meet the minimum content level for the item under which that product falls. Through subsequent proposed and final rules, USDA will designate items; qualifying products that fall under those designated items will qualify for preferred procurement.

One commenter suggested that only products having a minimum of 65 to 70 percent biobased content be eligible to be designated for preferred procurement under the program. Other commenters also sought to maximize biobased content in designated items, with one commenter stating that products with the highest biobased content—everything else being equal—must be preferred over products with lower biobased content, and the other urging USDA to eliminate all language in its rules on this program that undermine the ''highest percentage of biobased products practicable'' directive from Congress.

While the 65 to 70 percent minimum recommended by the one commenter would certainly ensure a high level of biobased content in designated items, such a high level of biobased content is not realistically obtainable for many items, which means that entire classes of articles with lower content levels would be excluded from the program. USDA fully agrees with the goals expressed by the other commenters, and does not think that the guidelines contain any provisions that would undermine section 9002's requirement to give preference to products with the highest percentage of biobased products practicable.

One commenter suggested that rather than determining biobased content on an item-by-item basis, USDA should focus on determining the biobased content of ingredients; with that information, the total biobased content of a product could simply be determined by adding the content of its ingredients. This commenter stated that the ASTM International Radioisotope Standard Method could be used to determine biobased content of ingredients, and a database of results could be maintained and used to determine quickly whether a product would qualify for designation.

Section 9002 focuses on the biobased content of the product itself. Section 9002(e) requires USDA to set forth recommended practices with respect to certification by vendors of the percentage of biobased products used and, where appropriate, recommend the level of biobased material to be contained in the procured product. Given those requirements, as a policy matter USDA has decided that the process of setting minimum content standards on an item-by-item basis described in the proposed rule and these final guidelines is necessary and practical.

One commenter stated that rather than developing a finite list of biobased products for preferred procurement, USDA should: (1) Develop standard formulas for calculating biobased content; (2) develop a biobased content label for ease of product comparison (somewhat like the USDA organic labeling system); and (3) publish regularly updated product bulletins reporting the latest in biobased product availability.

Section 9002 requires, among other things, that USDA: (1) Designate items that are or can be produced with biobased products; (2) provide information as to the availability, relative price, performance, and environmental and public health benefits of those items; and (3) in making designations, consider the availability of such items. Taken together, these requirements demand the development of a list; to the extent that such a list would be a ''living document'' subject to updates as often as appropriate, it would serve the same function as the regular bulletins suggested by the commenter. USDA's electronic information system will include information on designated items and will post information voluntarily submitted by manufacturers or vendors on the products they intend to offer for preferred procurement under each item designated.

Looking beyond the initial setting of minimum biobased content levels and designation of items, three commenters addressed the subject of subsequent adjustments to established minimum content levels. Two of those comments simply pointed out the need for USDA to create a mechanism to adjust minimum content levels for items to reflect the development of new technologies and product refinements over time, perhaps by seating a standing review committee of experts from the manufacturing, academic, public interest, government, and consumer sectors. The third commenter suggested that adjustments to minimum biobased content levels should be made no more often than once every five years. This would be sufficient time to allow products with higher biobased content to be developed while providing an adequate ''useful life'' for products meeting existing standards. Without a five-year assurance, producers may be reluctant to invest in products for fear that they may become stranded when new levels are set.

USDA currently does not anticipate the need to make the sorts of adjustments described by the commenters. Minimum content levels will be set as items are designated, and agencies will be provided with information on, among other things, the biobased content of specific products within the designated items. Section 9002 requires that agencies purchasing designated items give preference to those products that have the highest percentage of biobased products practicable. If competitive factors lead vendors to increase the biobased content of their products, those increases would not necessarily invalidate the minimum content levels expressed in the guidelines.

Three commenters addressed the relationship between minimum biobased content levels and product performance. One commenter simply stated that USDA must take into account a product's end use, and the performance necessary to function properly in that use, when setting

minimum biobased content. The other two commenters suggested that, in general, minimum percentages should be set at the lower end of a range in order for biobased products to meet necessary performance standards and be cost competitive. Still other commenters, most often referring to specific items or generic groupings of items, urged USDA to apply or reference the existing standards used by manufacturers (for example, the American Petroleum Institute (API) and SAE standards for lubricants) when preparing performance, content, and other specifications during the designation process.

USDA expects that evidence of performance will be a very important factor in Federal agencies' decisions to procure an item, and that in most cases biobased items can be manufactured with a blend of components that enable them to meet required performance standards. It is in the best interests of the program for minimum biobased content to be set at levels that will realistically allow products to possess the necessary performance attributes and allow them to compete with fossil energy based products in performance and economics. The goal of section 9002 is to promote the use of biobased products to the extent possible, and that goal would not be served by requirements for unrealistically high biobased content levels. In many cases, especially for users of high performance items in Federal agencies, formal evidence of performance may be required, and these guidelines encourage agencies to request this information from manufacturers or vendors of designated items, focusing on performance against ASTM, ISO, Federal or military specifications, or other industry performance standards.

One commenter asked if energy is produced from biomass using the gasification/steam reforming process, would that energy, if offered for sale to Federal agencies, qualify for procurement preference under the proposed program? While the commenter did not specify, it appears that the energy he is referring to is electricity. As provided by paragraph (i) of section 9002, these guidelines do not apply to the procurement of electricity.

One commenter noted that, under EPA's regulations in 40 CFR part 279, generators of used oil are not required to determine whether their oil displays any hazardous waste characteristics; however, under § 279.1 of those regulations, ''used oil'' is limited only to those spent oils that have been refined from crude or synthetic oils. Thus, oils derived from vegetable or animal sources are specifically excluded from used oil regulation, which means that generators of used bio-oils will be required to determine if those oils display any hazardous waste characteristics (which could have been acquired by the bio-oil during its usage). The commenter urged USDA to work with EPA in developing a workable and environmentally sound strategy for managing spent bio-oils before any items in this category are designated, arguing that any benefits that might be gained through conserving petroleum resources could be undermined by the more stringent hazardous waste management standards that would have to be met by users of bio-oils.

USDA agrees that it is important that these sorts of issues be addressed in order to prevent the unintended consequences highlighted by the commenter from complicating efforts to attain the goals of section 9002. However, this final rule is not the appropriate place to address the commenter's point. In an effort to address this concern, USDA will, therefore, initiate a dialog with our counterparts at EPA before designating bio-oils that could, after use, potentially be considered hazardous waste.

One commenter expressed broad and far-reaching concerns regarding the program and the proposed rule, mainly with respect to its potential negative impact on the procurement of non-biobased products in general and non-biobased plastics in particular. This commenter brought up a variety of issues on the subject, including: (1) The veracity of claims relating to the compostability/biodegradability of biobased materials, especially in light of the lack of municipal solid waste composting in the United States; (2) the potential for such claims to mislead buyers and the public into assuming that biobased materials are always environmentally preferable to non-biobased materials, especially when there appears to be little in the guidelines in the way of substantiating claims of compostability/biodegradability; (3) the potential for the proposed ''U.S.D.A. Certified Biobased Product'' label to further reinforce those mistaken consumer perceptions; (4) the potential for the program as a whole to lead consumers to neglect the broader benefits of non-biobased products; and (5) the failure of the proposed rule's economic analysis to address adequately the potential economic impact of the program's displacement of non-biobased products in the marketplace.

In designating items, USDA will consider the item's compostability and biodegradability to the extent that these factors are relevant to the economic and technological feasibility of the item, including life cycle costs. As discussed below, USDA has yet to prepare eligibility criteria and guidelines for the use of the ''U.S.D.A. Certified Biobased Product'' label. Finally, in the proposed rule's discussion of the Regulatory Flexibility Act, USDA acknowledged that the program may decrease opportunities for small businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. However, USDA cannot address the potential economic effects of designating an item—positive or negative—on affected entities until it is prepared to propose that item for designation and has conducted the analyses needed to support the proposal.

Comments on Planned Labeling Program and Other Issues

In the preamble of the proposed rule, USDA discussed the provisions of section 9002 that direct USDA, in consultation with the Administrator of the EPA, to establish a voluntary program authorizing producers of biobased products to use a ''U.S.D.A. Certified Biobased Product'' label. USDA indicated that in a subsequent rulemaking it would establish that voluntary program and provide eligibility criteria and guidelines for the use of the ''U.S.D.A. Certified Biobased Product'' label.

Two commenters urged USDA to move forward as quickly as possible with the labeling aspect of the biobased program. Two other commenters, however, urged caution. These commenters raised several specific concerns about the potential impact the label could have on market and consumer perceptions—*e.g.*, an assumption that a labeled product is automatically ''better'' or ''more environmentally friendly'' than an unlabeled product—and argued that a simple label cannot adequately communicate necessary information about life cycle results, performance, and environmental health benefits. Without qualifying the claims or disclosing the relevant information, one commenter claimed, misinterpretation of the label by consumers and government purchasers is virtually assured. Another commenter stated that any products that have been subjected to a BEES analysis should be automatically eligible to use the ''U.S.D.A. Certified Biobased'' label without further analysis or rulemaking.

Section 9002 provides that USDA, in consultation with the Administrator of

the EPA, will issue criteria for determining which products may qualify to receive the label. The statute intends that those criteria will encourage the purchase of products with the maximum biobased content, and should, to the maximum extent possible, be consistent with the guidelines in this final rule. In the proposed rule, in order to signal USDA thinking on the subject, USDA described its view of the potential parameters of the labeling program. Those parameters were not definitive; indeed, numerous other considerations such as those described by the commenters will be considered as USDA drafts the criteria for determining which products may qualify to receive the label. Once drafted, the specific criteria that USDA develops in consultation with EPA will be presented in a proposed rule; the public will have a meaningful opportunity to comment upon the scope and adequacy of the criteria, and comments received will be considered before the criteria become final.

One commenter noted that the FAR will require revision in order for agencies to fully implement the new biobased content product purchasing program and encouraged USDA to coordinate with Federal agencies in preparing the draft changes to the FAR. As previously discussed, the FAR will be revised to implement the procurement aspects of the program.

One commenter stated that USDA should recognize agencies' past green purchasing efforts by recommending that agencies revise their existing plans to incorporate a biobased purchasing preference rather than creating a separate program solely for purchasing biobased products. This comment is outside the scope of this rulemaking. It relates to the implementation of the procurement aspects of this program, which will be accomplished through revisions to the FAR.

Several commenters addressed the relationship between the proposed biobased program and existing ''green'' and other purchasing initiatives already underway within the Federal Government or the private sector. These commenters stressed the need for coordination between the USDA program and others such as EPA's RCRA programs, the Department of Energy's (DOE's) Energy Star program, the consensus standards of the Green Seal organization, and the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) system for sustainable building construction. To illustrate this point, one commenter noted that EPA is considering the designation of recycled-content roofing materials under RCRA, DOE has made recommendations for energy efficient and Energy Star roofing materials, and USDA could consider the designation of biobased-content roofing materials. This commenter suggested that USDA should coordinate its designation of products with EPA and DOE, with the goal of seamlessly integrating the purchasing of biobased products into the existing green purchasing infrastructure.

Section 9002 requires specific actions on the parts of USDA, OFPP, and individual agencies. Similarly, EPA and DOE are charged with specific mandates with respect to RCRA and Energy Star. In some respects, the language of the enabling statutes that gave rise to these and similar programs may limit the extent to which the implementing agencies can coordinate these programs. USDA, to the extent practicable, will strive to coordinate the biobased preference program with existing green purchasing programs.

One commenter suggested that all compost materials, and perhaps other products in the landscaping products category, should be added to the JWOD Procurement List as ''mandatory buy'' items in order to streamline product introduction and reduce procurement costs. (JWOD refers to the Javits-Wagner-O'Day Program, a Federal employment and job training program for people who are blind and/or have severe disabilities.)

Under the JWOD Act, it is the Committee for Purchase from People Who Are Blind or Severely Disabled that is responsible for determining which commodities and services procured by the Federal Government are suitable to be furnished by qualified nonprofit agencies employing persons who are blind or have other severe disabilities. Thus it is the committee, and not USDA, that would add such items to the JWOD Procurement List.

Therefore, for the reasons given in the proposed rule and in this document, USDA adopts the proposed rule as a final rule, with the changes discussed in this document.

V. Regulatory Information

A. Executive Order 12866, Regulatory Planning and Review

It is estimated this final rule will not adversely affect or have an annual effect of $100 million or more on the economy. The actual designation of items under this program through future rulemaking actions are what will have an effect on the economy. The extent of the impact necessarily can be determined only at the time of those future rulemaking actions and will be addressed at that time. This rule does not designate any items. Each time an item is proposed for designation, USDA will evaluate the economic effect of that designation.

Furthermore, this rule will not create a serious inconsistency or otherwise interfere with prior or intended actions of another agency, will not materially alter the budgetary impact of grants or similar programs or the rights of recipients thereof, and does not raise novel legal or policy issues. For the above reasons, this rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

B. Regulatory Flexibility Act

When an agency issues a final rule following a proposed rule, the Regulatory Flexibility Act (RFA, 5 U.S.C. 601–612) requires the agency to prepare a final regulatory flexibility analysis. 5 U.S.C. 604. However, the requirement for a final regulatory flexibility analysis does not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

Although this program ultimately may have a direct impact on a substantial number of small entities, USDA has determined that this rule itself will not have a direct significant economic impact on a substantial number of small entities. This rule will affect directly primarily Federal agencies. Private sector manufacturers and vendors of biobased products voluntarily may provide information to USDA through the means set forth in this rule. However, the rule imposes no requirement on manufacturers and vendors to do so, and does not differentiate between manufacturers and vendors based on size. USDA does not know how many small manufacturers and vendors may opt to participate at this stage of the program.

As explained above, when USDA issues a proposed rulemaking to designate items for preferred procurement under this program, USDA will assess the anticipated impact of such designations, including the impact on small entities. USDA anticipates that this program will impact small entities which manufacture or sell biobased products. For example, once items are designated, this program will provide additional opportunities for small businesses to manufacture and sell

biobased products to Federal agencies. This program also will impact indirectly small entities that supply biobased materials to manufacturers. Additionally, this program may decrease opportunities for small businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. Again, USDA cannot assess these anticipated impacts on small entities until USDA proposes items for designation. This rule does not designate any items.

The rule will directly impact small entities by implementing a cost-sharing program which gives first consideration to proposals for products of ''small and emerging business enterprises.'' Submission of a proposal is voluntary and not limited to small entities. The direct impact would be beneficial for those entities whose products are selected for cost sharing. Because of the limited amount of funds available for cost sharing, the ceilings on cost sharing, and the anticipated breadth of any competition (not limited to a particular manufacturing sector and open to other than small entities), USDA does not anticipate that this cost-sharing competition will have a significant economic impact on a substantial number of small entities.

Accordingly, USDA hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12630

This rule has been reviewed in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and does not contain policies that would have implications for these rights.

D. Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule does not preempt State or local laws, is not intended to have retroactive effect, and does not involve administrative appeals.

E. Executive Order 13132

This rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

F. Unfunded Mandates Reform Act of 1995

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, for State, local, and tribal governments, or the private sector. Therefore, a statement under Section 202 of UMRA is not required.

G. Executive Order 12372

For the reasons set forth in the Final Rule Related Notice for 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of the Executive Order 12372, which requires intergovernmental consultation with State and local officials. This program does not directly affect State and local governments.

H. Executive Order 13175

The policies contained in this rulemaking do not have tribal implications and thus no further action is required under Executive Order 13175.

I. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), USDA published notice of the proposed information collection with the proposed rule on December 19, 2003 (68 FR 70730). During the course of program implementation, USDA realized that it overestimated the overall average burden per respondent in that notice and underestimated the number of respondents during the first three years of item designation under the program. Therefore, USDA is republishing herein a revised proposed information collection notice. Comments addressing the revised proposed information collection should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Agriculture, Margaret Malanoski, 725 17th Street, NW., Room 10202, Washington, DC 20503. Comments should be submitted within 30 days of the date of publication of this notice. In the interim, USDA has received through emergency processing short-term information collection approval by OMB under OMB control number 0503–0011. The short-term information collection approval will expire on March 31, 2005.

Title: Guidelines for Designating Biobased Products for Preferred Procurement.

Abstract: The USDA Federal Biobased Products Preferred Procurement Program (FB4P) provides that qualifying biobased products that fall under items (generic groupings of biobased products) that have been designated for preferred procurement by rule making are required to be purchased by Federal agencies, with certain limited exceptions. USDA is required by section 9002 to gather certain information on items before it can designate them by rule making. Further, USDA also is required by section 9002 to provide certain information on qualified biobased products to Federal agencies. To meet those statutory requirements, USDA will use a number of forms to gather that information from manufacturers and vendors of biobased products. To the extent feasible, the information sought by USDA can be transmitted electronically using the Web site *http://www.biobased.oce.usda.gov*. If electronic transmission of information is not practical, USDA will provide technical assistance to support the transmission of information to USDA. The information collected will enable USDA to meet statutory information requirements that then permit USDA to designate items for preferred procurement under FB4P. Once items are designated, manufacturers and vendors of qualifying biobased products that fall under these designated items will benefit from preferred procurement by Federal agencies.

USDA currently has identified 83 potential items for designation and estimates there may be on average 30 separate products per item. Designation of items will begin after publication of this final rule for the FB4P. While it is expected that additional items will be identified over time as the biobased products industry develops and matures, it is not expected that there will be a rapid increase in the number of items beyond the number identified thus far. Because of fiscal year (FY) 2005 appropriations to support this program, USDA intends to place special emphasis on designating by rule making as many of the 83 identified items as possible during the next three fiscal years. USDA hopes to designate by rule making between 40 and 50 items during FY 2005. The balance of the currently identified items are expected to be designated by rule making during FY 2006 and FY 2007.

For designating items, USDA estimates collecting information from an average of five manufacturers per item proposed for designation. USDA estimates that each manufacturer will expend 80 hours per response to the information collection.

Once an item is designated, OEPNU will invite manufacturers and vendors of biobased products that fall under that item to post product and contact information about their qualifying

biobased products on the USDA Web site *http://www.biobased.oce.usda.gov*. This Web site will be a major source of product information for Federal agencies seeking to purchase biobased products. Information requested will include identification of products offered for preferred procurement within a designated item, contact information for the manufacturer or vendor, and demographic information about the manufacturer or vendor that will assist Federal agencies in reporting on the performance of the preferred procurement program. Additional information will be sought regarding availability; relative prices of the products; performance of the products; and environmental and public health benefits. This information may be included on the Web site or a hotlink may be established to manufacturers' or vendors' web sites to access the information. The information sought for this voluntary Web site is envisioned to be non-proprietary.

USDA estimates that it will require 4 hours per product of manufacturers' or vendors' time to post this information, and that there will be an average of 30 products per item eligible to be posted. Many items will have fewer than 30 products in the marketplace, however. Thus, for example, 30 products each from 50 items would create a burden of 6,000 hours of manufacturers' time in FY 2005. Thus, the total manufacturers' time burden for FY 2005, if 50 items are designated by rule making, would be 26,000 hours.

Beyond FY 2007, new item designations would slow dramatically and be premised on development of new biobased products that did not fit into already designated items.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 14.9 hours per response.

Respondents: Manufacturers and vendors of biobased products.

Estimated Number of Respondents: 2,905.

Estimated Number of Responses Per Respondent: One per manufacturer or vendor.

Estimated Total Annual Burden on Respondents: 14,387 hours one time only. Manufacturers and vendors are asked to respond only once per product. Thereafter, there is no ongoing annual paperwork burden on respondents.

USDA invites written comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of the information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

After receipt of notification of OMB action on this request for information collection approval, USDA will publish a notice in the **Federal Register** to inform the public of OMB's decision.

J. Government Paperwork Elimination Act Compliance

OEPNU is committed to compliance with the Government Paperwork Elimination Act (GPEA) (44 U.S.C. 3504 note), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this rule, please contact Marvin Duncan at (202) 401–0532.

K. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of $100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

List of Subjects in 7 CFR Part 2902

Biobased products, Procurement.

■ For the reasons stated in the preamble, the Department of Agriculture is amending 7 CFR chapter XXIX as follows:

CHAPTER XXIX—OFFICE OF ENERGY POLICY AND NEW USES, DEPARTMENT OF AGRICULTURE

■ 1. The chapter heading of chapter XXIX is revised to read as set forth above.

■ 2. A new part 2902 is added to chapter XXIX to read as follows:

PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

Subpart A—General

Subpart B—Designated Items [Reserved]

Authority: 7 U.S.C. 8102.

Subpart A—General

§ 2902.1 Purpose and scope.

(a) *Purpose.* The purpose of the guidelines in this part is to assist Federal agencies in complying with the requirements of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), Public Law 107–171, 116 Stat. 476 (7 U.S.C. 8102), as they apply to the procurement of the items designated in subpart B of this part.

(b) *Scope.* The guidelines in this part designate items that are or can be produced with biobased products and whose procurement by Federal agencies will carry out the objectives of section 9002 of FSRIA.

§ 2902.2 Definitions.

These definitions apply to this part:

Agricultural materials. Agricultural-based, including plant, animal, and marine materials, raw materials or residues used in the manufacture of commercial or industrial, nonfood/nonfeed products.

ASTM International. ASTM International, a nonprofit organization organized in 1898, is one of the largest voluntary standards development organizations in the world with about 30,000 members in over 100 different countries. ASTM provides a forum for the development and publication of voluntary consensus standards for materials, products, systems, and services.

BEES. An acronym for ''Building for Environmental and Economic Sustainability,'' an analytic tool used to determine the environmental and health benefits and life cycle costs of items, developed by the U.S. Department of Commerce National Institute of Standards and Technology, with support from the U.S. Environmental Protection Agency, Office of Pollution

Prevention and Toxics (BEES 3.0, Building for Environmental and Economic Sustainability Technical Manual and User Guide, NISTIR 6916, National Institute of Standards and Technology, U.S. Department of Commerce, October 2002). Also, see *http://www.bfrl.nist.gov/oae/software/bees_USDA.html* for a discussion of how biobased feedstocks are addressed in the BEES Analysis.

Biobased components. Any intermediary biobased materials or parts that, in combination with other components, are functional parts of the biobased product.

Biobased content. Biobased content shall be determined based on the amount of biobased carbon in the material or product as a percent of weight (mass) of the total organic carbon in the material or product.

Biobased product. A product determined by USDA to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products or renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials.

Biological products. Products derived from living materials other than agricultural or forestry materials.

Designated item. A generic grouping of biobased products identified in subpart B that is eligible for the procurement preference established under section 9002 of FSRIA.

Diluent. A substance used to diminish the strength, scent, or other basic property of a substance.

Engineered wood products. Products produced with a combination of wood, food fibers and adhesives.

Federal agency. Any executive agency or independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).

Filler. A substance added to a product to increase the bulk, weight, viscosity, strength, or other property.

Forest thinnings. Refers to woody materials removed from a dense forest, primarily to improve growth, enhance forest health, or recover potential mortality. (To recover potential mortality means to remove trees that are going to die in the near future.)

Forestry materials. Materials derived from the practice of planting and caring for forests and the management of growing timber. Such materials must come from short rotation woody crops (less than 10 years old), sustainably managed forests, wood residues, or forest thinnings.

Formulated product. A product that is prepared or mixed with other ingredients, according to a specified formula and includes more than one ingredient.

FSRIA. The Farm Security and Rural Investment Act of 2002, Public Law 107–171, 116 Stat. 134 (7 U.S.C. 8102).

Ingredient. A component; part of a compound or mixture; may be active or inactive.

ISO. The International Organization for Standardization, a network of national standards institutes from 145 countries working in partnership with international organizations, governments, industries, business, and consumer representatives.

Neat product. A product that is made of only one ingredient and is not diluted or mixed with other substances.

Relative price. The price of a product as compared to the price of other products on the market that have similar performance characteristics.

Residues. That which remains after a part is taken, separated, removed, or designated; a remnant; a remainder; and, for this purpose, is from agricultural materials, biological products, or forestry materials.

Secretary. The Secretary of the United States Department of Agriculture.

Small and emerging private business enterprise. Any private business which will employ 50 or fewer new employees and has less than $1 million in projected annual gross revenues.

Sustainably managed forests. Refers to the practice of a land stewardship ethic that integrates the reforestation, management, growing, nurturing, and harvesting of trees for useful products while conserving soil and improving air and water quality, wildlife, fish habitat, and aesthetics.

§ 2902.3 Applicability to Federal procurements.

(a) *Applicability to procurement actions.* The guidelines in this part apply to all procurement actions by Federal agencies involving items designated by USDA in this part, where the Federal agency purchases $10,000 or more worth of one of these items during the course of a fiscal year, or where the quantity of such items or of functionally equivalent items purchased during the preceding fiscal year was $10,000 or more. The $10,000 threshold applies to Federal agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger Federal department or agency.

(b) *Exception for procurements subject to EPA regulations under the Solid Waste Disposal Act.* For any procurement by any Federal agency that is subject to regulations of the Administrator of the Environmental Protection Agency under section 6002 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (40 CFR part 247), these guidelines do not apply to the extent that the requirements of this part are inconsistent with such regulations.

(c) *Procuring items composed of highest percentage of biobased products.* FSRIA section 9002(c)(1) requires Federal agencies to procure designated items composed of the highest percentage of biobased products practicable, consistent with maintaining a satisfactory level of competition, considering these guidelines. Federal agencies may decide not to procure such items if they are not reasonably priced or readily available or do not meet specified or reasonable performance standards.

§ 2902.4 Procurement programs.

(a) *Integration into the Federal procurement framework.* The Office of Federal Procurement Policy, in cooperation with USDA, has the responsibility to coordinate this policy's implementation in the Federal procurement regulations. These guidelines are not intended to address full implementation of these requirements into the Federal procurement framework. This will be accomplished through revisions to the Federal Acquisition Regulation.

(b) *Federal agency preferred procurement programs.* (1) On or before January 11, 2006, each Federal agency shall develop a procurement program which will assure that items composed of biobased products will be purchased to the maximum extent practicable and which is consistent with applicable provisions of Federal procurement laws. Each procurement program shall contain:

(i) A preference program for purchasing designated items,

(ii) A promotion program to promote the preference program; and

(iii) Provisions for the annual review and monitoring of the effectiveness of the procurement program.

(2) In developing the preference program, Federal agencies shall adopt one of the following options, or a substantially equivalent alternative, as part of the procurement program:

(i) A policy of awarding contracts to the vendor offering a designated item composed of the highest percentage of biobased product practicable except when such items:

(A) Are not available within a reasonable time;

(B) Fail to meet performance standards set forth in the applicable specifications, or the reasonable performance standards of the Federal agency; or

(C) Are available only at an unreasonable price.

(ii) A policy of setting minimum biobased products content specifications in such a way as to assure that the biobased products content required is consistent with section 9002 of FSRIA and the requirements of the guidelines in this part except when such items:

(A) Are not available within a reasonable time;

(B) Fail to meet performance standards for the use to which they will be put, or the reasonable performance standards of the Federal agency; or

(C) Are available only at an unreasonable price.

(c) *Procurement specifications.* After the publication date of each designated item, Federal agencies that have the responsibility for drafting or reviewing specifications for items procured by Federal agencies shall ensure within a specified time frame that their specifications require the use of designated items composed of biobased products, consistent with the guidelines in this part. USDA will specify the allowable time frame in each designation rule. The biobased content of a designated item may vary considerably from product to product based on the mix of ingredients used in its manufacture. In procuring designated items, the percentage of biobased product content should be maximized, consistent with achieving the desired performance for the product.

§ 2902.5 Item designation.

(a) *Procedure.* Designated items are listed in subpart B. In designating items, USDA will designate items composed of generic groupings of specific products and will identify the minimum biobased content for each listed item. As items are designated for procurement preference, they will be added to subpart B. Items are generic groupings of specific products. Products are specific products offered for sale by a manufacturer or vendor. Although manufacturers and vendors may submit recommendations to USDA for future item designations at any time, USDA does not have a formal process for such submissions or for responding to such submissions.

(b) *Considerations.* In designating items, USDA will consider the availability of such items and the economic and technological feasibility of using such items, including life cycle costs. USDA will gather information on individual products within an item and extrapolate that product information to the item level for consideration in designating items. In considering these factors, USDA will use life cycle cost information only from tests using the BEES analytical method.

(c) *Exclusions.* (1) Motor vehicle fuels and electricity are excluded by statute from this program.

(2) USDA additionally will not designate items for preferred procurement that are determined to have mature markets. USDA will determine mature market status by whether the item had significant national market penetration in 1972.

§ 2902.6 Providing product information to Federal agencies.

(a) *Informational Web site.* An informational USDA Web site implementing section 9002 can be found at: *http://www.biobased.oce.usda.gov.* USDA will maintain a voluntary Web-based information site for manufacturers and vendors of designated items produced with biobased products and Federal agencies to exchange product information. This Web site will provide information as to the availability, relative price, biobased content, performance and environmental and public health benefits of the designated items. USDA encourages manufacturers and vendors to provide product, business contacts, and product information for designated items. Instructions for posting information are found on the Web site itself. USDA also encourages Federal agencies to utilize this Web site to obtain current information on designated items, contact information on manufacturers and vendors, and access to information on product characteristics relevant to procurement decisions. In addition to any information provided on the Web site, manufacturers and vendors are expected to provide relevant information to Federal agencies, upon request, with respect to product characteristics, including verification of such characteristics if requested.

(b) *Advertising, labeling and marketing claims.* Manufacturers and vendors are reminded that their advertising, labeling, and other marketing claims, including claims regarding health and environmental benefits of the product, must conform to the Federal Trade Commission Guides for the Use of Environmental Marketing Claims, 16 CFR part 260.

§ 2902.7 Determining biobased content.

(a) *Certification requirements.* For any product offered for preferred procurement, manufacturers and vendors must certify that the product meets the biobased content requirements for the designated item within which the product falls. Paragraph (c) of this section addresses how to determine biobased content. Upon request, manufacturers and vendors must provide USDA and Federal agencies information to verify biobased content for products certified to qualify for preferred procurement.

(b) *Minimum biobased content.* Unless specified otherwise in the designation of a particular item, the minimum biobased content requirements in a specific item designation refer to the biobased portion of the product, and not the entire product.

(c) *Determining biobased content.* Verification of biobased content must be based on third party ASTM/ISO compliant test facility testing using the ASTM International Radioisotope Standard Method D 6866. ASTM International Radioisotope Standard Method D 6866 determines biobased content based on the amount of biobased carbon in the material or product as percent of the weight (mass) of the total organic carbon in the material or product.

(d) *Products with the same formulation.* In the case of products that are essentially the same formulation, but marketed under a variety of brand names, biobased content test data need not be brand-name specific.

§ 2902.8 Determining life cycle costs, environmental and health benefits, and performance.

(a) *Providing information on life cycle costs and environmental and health benefits.* When requested by Federal agencies, manufacturers and vendors must provide information on life cycle costs and environmental and health benefits based on tests using either of two analytical approaches: The BEES analytical tool along with the qualifications of the independent testing entity that performed the tests; or either a third-party or an in-house conducted analysis using the ASTM standard for evaluating and reporting on environmental performance of biobased products D7075. Both BEES and the ASTM standard are in accordance with ISO standards, are focused on testing of biobased products, and will provide the life cycle assessment and life cycle cost information Federal agencies might require. As with biobased content, test

data using the above analytical methods need not be brand-name specific.

(b) *Performance test information.* In assessing performance of qualifying biobased products, USDA requires that Federal agencies rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards. Such testing must be conducted by an ASTM/ISO compliant laboratory. The procuring official will decide whether performance data must be brand-name specific in the case of products that are essentially of the same formulation.

§ 2902.9 Funding for testing.

(a) *USDA use of funds for biobased content and BEES testing.* USDA will use funds to support testing for biobased content and conduct of BEES testing for products within items USDA has selected to designate for preferred procurement through early regulatory action. USDA initially will focus on gathering the necessary test information on a sufficient number of products within an item (generic grouping of products) to support regulations to be promulgated to designate an item or items for preferred procurement under this program. USDA may accept cost sharing for such testing to the extent consistent with USDA product testing decisions. During this period USDA will not consider cost sharing in deciding what products to test. When USDA has concluded that a critical mass of items have been designated, USDA will exercise its discretion, in accordance with the competitive procedures outlined in paragraph (b) of this section, to allocate a portion of the available USDA testing funds to give priority to testing of products for which private sector firms provide cost sharing for the testing.

(b) *Competitive program for cost sharing for determining life cycle costs, environmental and health benefits, and performance.* (1) Subject to the availability of funds and paragraph (a) of this section, USDA will announce annually the solicitation of proposals for cost sharing for life cycle costs, environmental and health benefits, and performance testing of biobased products in accordance with the standards set forth in § 2902.8 to carry out this program. Information regarding the submission of proposals for cost sharing also will be posted on the USDA informational Web site, *http://www.biobased.oce.usda.gov.*

(2) Proposals will be evaluated and assigned a priority rating. Priority ratings will be based on the following criteria:

(i) A maximum of 25 points will be awarded a proposal based on the market readiness;

(ii) A maximum of 20 points will be awarded a proposal based on the potential size of the market for that product in Federal agencies;

(iii) A maximum of 25 points will be awarded based on the financial need for assistance of the manufacturer or vendor;

(iv) A maximum of 20 points will be awarded a proposal based on the product's prospective competitiveness in the market place;

(v) A maximum of 10 points will be awarded a proposal based on its likely benefit to the environment.

(3) Cost-sharing proposals will be considered first for high priority products of small and emerging private business enterprises. If funds remain to support further testing, USDA will consider cost sharing proposals for products of all other producers of biobased items as well as the remaining proposals for products of small and emerging private business enterprises. Proposals will be selected based on priority rating until available funds for the fiscal year are committed.

(4)(i) For products selected for life cycle costs and environmental and health benefits testing under this paragraph, USDA could provide up to 50 percent of the cost of determining the life cycle costs and environmental and health effects, up to a maximum of $5,000 of assistance per product.

(ii) For products selected for performance testing under this paragraph, USDA could provide up to 50 percent of the cost for performance testing, up to $100,000 of assistance per product for up to two performance tests (measures of performance) per product.

(5) For selected proposals, USDA will enter into agreements with and provide the funds directly to the testing entities.

(6) Proposals submitted in one fiscal year, but not selected for cost sharing of testing in that year, may be resubmitted to be considered for cost sharing in the following year.

Subpart B—Designated Items [Reserved]

Dated: January 3, 2005.

Keith Collins,

Chief Economist, Department of Agriculture.

[FR Doc. 05–399 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–GL–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No. 27854; Amendment No. 13–32]

RIN 2120–AE84

Civil Penalty Assessment Procedures; Correction

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final rule; correction and technical amendment.

SUMMARY: This action makes minor editorial corrections to the final rule published in the **Federal Register** on October 4, 2004 (69 FR 59490) and technical corrections to one of the regulations it amended. That final rule adopted changed procedures concerning initiating and adjudicating an administratively assessed civil penalty against an individual acting as a pilot, flight engineer, mechanic, or repairman. Corrections include a quote and reference in the preamble, the removal of a redundant paragraph in the rule language, and several cross references to, and a typographical error in, redesignated paragraphs.

DATES: Effective January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Joyce Redos, Attorney, telephone (202) 267–3137.

SUPPLEMENTARY INFORMATION: The final rule, published on October 4, 2004 (69 FR 59490), codified in Part 13 procedures relating to FAA civil penalty actions against a pilot, flight engineer, mechanic, or repairman, which are subject to review by the National Transportation Safety Board under 49 U.S.C. 46301(d)(5). The rule also made other minor modifications to the FAA's procedures for assessing civil penalties against persons other than pilots, flight engineers, mechanics or repairmen.

This publication corrects a quote and a reference in the preamble and removes a redundant section in 14 CFR 13.14. In § 13.14, paragraphs (a) and (b) are substantively identical, only set out differently. Paragraph (a) is, therefore, removed, and the paragraphs renumbered.

This publication also corrects several cross references to, and one typographical error in, redesignated paragraphs in § 13.16. The entire text of § 13.16 is republished for clarity. The first sentence in paragraph (d) is changed to add a cross reference to paragraph (c). In paragraph (d)(2), the cross reference to paragraph (e)(2)(ii) is changed to paragraph (g)(2)(ii). In

paragraphs (g) and (g)(1)(ii), the cross references to paragraph (d)(2) are changed to paragraph (f)(2). In paragraph (h), the cross references to paragraph (d)(3) and paragraph (e)(2)(ii) are changed to paragraph (f)(3) and paragraph (g)(2)(ii), respectively. In paragraph (i), the cross references to paragraph (d)(3) and paragraph (e)(2)(ii) are also changed to paragraph (f)(3) and paragraph (g)(2)(ii), respectively. In the second sentence of program (m)(1), the word ''nor'' is changed to ''or''

Corrections to Preamble

■ In final rule **Federal Register** Doc. 04–22276, published on October 4, 2004 (69 FR 58490), make the following corrections.

■ 1. On page 59492, in the second column, in the first sentence under Compromise Order remove the words ''Section 46301(i)(1)'' and correct to read ''Section 46301(f)(1)''.

■ 2. On page 59493, in the third column, in the second line from the top, remove the word ''with'' and correct to read ''within''.

List of Subjects in 14 CFR Part 13

Administrative practice and procedure, Air transportation, Investigations, Law enforcement, Penalties.

The Amendment

■ The Federal Aviation Administration corrects Part 13 of Title 14 of the Code of Federal Regulations to read as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

■ 1. The authority citation for part 13 continues to read as follows:

Authority: 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 106(g), 5121–5124, 40113–40114, 44103–44106, 44702–44703, 44709–44710, 44713, 46101–46110, 46301–46316, 46318, 46501–46502, 46504–46507, 47106, 47111, 47122, 47306, 47531–47532; 49 CFR 1.47

§ 13.14 [Corrected]

■ 2. In § 13.14, remove paragraph (a) and redesignate paragraphs (b) through (d) as paragraphs (a) through (c).

■ 3. § 13.16 is revised to read as follows:

§ 13.16 Civil Penalties: Administrative assessment against a person other than an individual acting as a pilot, flight engineer, mechanic, or repairman. Administrative assessment against all persons for hazardous materials violations.

(a) The FAA uses these procedures when it assesses a civil penalty against a person other than an individual acting as a pilot, flight engineer, mechanic, or repairman for a violation cited in 40 U.S.C. 46301(d)(2) or 47531.

(b) *District court jurisdiction.* Notwithstanding the provisions of paragraph (a) of this section, the United States district courts have exclusive jurisdiction of any civil penalty action initiated by the FAA for violations described in those paragraphs, under 49 U.S.C. 46301(d)(4), if—

(1) The amount in controversy is more than $50,000 for a violation committed by any person before December 12, 2003;

(2) The amount in controversy is more than $400,000 for a violation committed by a person other than an individual or small business concern on or after December 12, 2003;

(3) The amount in controversy is more than $50,000 for a violation committed by an individual or a small business concern on or after December 12, 2003;

(4) The action is in rem or another action in rem based on the same violation has been brought;

(5) The action involves an aircraft subject to a lien that has been seized by the Government; or

(6) Another action has been brought for an injunction based on the same violation.

(c) *Hazardous materials violations.* The FAA may assess a civil penalty against any person who knowingly commits an act in violation of 49 U.S.C. chapter 51 or a regulation prescribed or order issued under that chapter, under 49 U.S.C. 5123 and 49 CFR 1.47(k). An order assessing a civil penalty for a violation under 49 U.S.C. chapter 51, or a rule, regulation, or order issued thereunder, is issued only after the following factors have been considered:

(1) The nature, circumstances, extent, and gravity of the violation;

(2) With respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) Such other matters as justice may require.

(d) *Order assessing civil penalty.* An order assessing civil penalty may be issued for a violation described in paragraphs (a) or (c) of this section, or as otherwise provided by statute, after notice and opportunity for a hearing. A person charged with a violation may be subject to an order assessing civil penalty in the following circumstances:

(1) An order assessing civil penalty may be issued if a person charged with a violation submits or agrees to submit a civil penalty for a violation.

(2) An order assessing civil penalty may be issued if a person charged with a violation does not request a hearing under paragraph (g)(2)(ii) of this section within 15 days after receipt of a final notice of proposed civil penalty.

(3) Unless an appeal is filed with the FAA decisionmaker in a timely manner, an initial decision or order of an administrative law judge shall be considered an order assessing civil penalty if an administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted.

(4) Unless a petition for review is filed with a U.S. Court of Appeals in a timely manner, a final decision and order of the Administrator shall be considered an order assessing civil penalty if the FAA decisionmaker finds that an alleged violation occurred and a civil penalty is warranted.

(3) *Delegation of authority.* (1) The authority of the Administrator under 49 U.S.C. 46301(d), 47531, and 5123, and 49 CFR 1.47(k) to initiate and assess civil penalties for a violation of those statutes or a rule, regulation, or order issued thereunder, is delegated to the Deputy Chief Counsel for Operations; the Assistant Chief Counsel for Enforcement; the Assistant Chief Counsel, Europe, Africa, and Middle East Area Office; the Regional Counsel; the Aeronautical Center Counsel; and the Technical Center Counsel.

(2) The authority of the Administrator under 49 U.S.C. 5123, 49 CFR 1.47(k), 49 U.S.C. 46301(d), and 49 U.S.C. 46305 to refer cases to the Attorney General of the United States, or the delegate of the Attorney General, for collection of civil penalties is delegated to the Deputy Chief Counsel for Operations; the Assistant Chief Counsel for Enforcement; Assistant Chief Counsel, Europe, Africa, and Middle East Area Office; the Regional Counsel; the Aeronautical Center Counsel; and the Technical Center Counsel.

(3) The authority of the Administrator under 49 U.S.C. 46301(f) to compromise the amount of a civil penalty imposed is delegated to the Deputy Chief Counsel for Operations; the Assistant Chief Counsel for Enforcement; Assistant Chief Counsel, Europe, Africa, and Middle East Area Office; the Regional Counsel; the Aeronautical Center Counsel; and the Technical Center Counsel.

(4) The authority of the Administrator under 49 U.S.C. 5123 (e) and (f) and 49 CFR 1.47(k) to compromise the amount of a civil penalty imposed is delegated to the Deputy Chief Counsel for Operations; the Assistant Chief Counsel for Enforcement; Assistant Chief Counsel, Europe, Africa, and Middle East Area Office; the Regional Counsel;

the Aeronautical Center Counsel; and the Technical Center Counsel.

(f) *Notice of proposed civil penalty.* A civil penalty action is initiated by sending a notice of proposed civil penalty to the person charged with a violation or to the agent for services for the person under 49 U.S.C. 46103. A notice of proposed civil penalty will be sent to the individual charged with a violation or to the president of the corporation or company charged with a violation. In response to a notice of proposed civil penalty, a corporation or company may designate in writing another person to receive documents in that civil penalty action. The notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty. Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation shall—

(1) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case either an order assessing civil penalty or compromise order shall be issued in that amount;

(2) Submit to the agency attorney one of the following:

(i) Written information, including documents and witness statements, demonstrating that a violation of the regulations did not occur or that a penalty or the amount of the penalty is not warranted by the circumstances.

(ii) A written request to reduce the proposed civil penalty, the amount of reduction, and the reasons and any documents supporting a reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business.

(iii) A written request for an informal conference to discuss the matter with the agency attorney and to submit relevant information or documents; or

(3) Request a hearing, in which case a complaint shall be filed with the hearing docket clerk.

(g) *Final notice of proposed civil penalty.* A final notice of proposed civil penalty may be issued after participation in informal procedures provided in paragraph(f)(2) of this section or failure to respond in a timely manner to a notice of proposed civil penalty. A final notice of proposed civil penalty will be sent to the individual charged with a violation, to the president of the corporation or company charged with a violation, or a person previously designated in writing by the individual, corporation, or company to receive documents in that civil penalty action. If not previously done in response to a notice of proposed civil penalty, a corporation or company may designate in writing another person to receive documents in that civil penalty action. The final notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty and, as a result of information submitted to the agency attorney during informal procedures, may modify an allegation or a proposed civil penalty contained in a notice of proposed civil penalty.

(1) A final notice of proposed civil penalty may be issued—

(i) If the person charged with a violation fails to respond to the notice of proposed civil penalty within 30 days after receipt of that notice; or

(ii) If the parties participated in any informal procedures under paragraph (f)(2) of this section and the parties have not agreed to compromise the action or the agency attorney has not agreed to withdraw the notice of proposed civil penalty.

(2) Not later than 15 days after receipt of the final notice of proposed civil penalty, the person charged with a violation shall do one of the following—

(i) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case either an order assessing civil penalty or a compromise order shall be issued in that amount; or

(ii) Request a hearing, in which case a complaint shall be filed with the hearing docket clerk.

(h) Request for a hearing. Any person charged with a violation may request a hearing, pursuant to paragraph (f)(3) or paragraph (g)(2)(ii) of this section, to be conducted in accordance with the procedures in subpart G of this part. A person requesting a hearing shall file a written request for a hearing with the hearing docket clerk (Hearing Docket, Federal Aviation Administration, 800, Independence Avenue, SW., Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk) and shall mail a copy of the request to the agency attorney. The request for a hearing may be in the form of a letter but must be dated and signed by the person requesting a hearing. The request for a hearing may be typewritten or may be legibly handwritten.

(i) *Hearing.* If the person charged with a violation requests a hearing pursuant to paragraph (f)(3) or paragraph (g)(2)(ii) of this section, the original complaint shall be filed with the hearing docket clerk and a copy shall be sent to the person requesting the hearing. The procedural rules in subpart G of this part apply to the hearing and any appeal. At the close of the hearing, the administrative law judge shall issue, either orally on the record or in writing, an initial decision, including the reasons for the decision, that contains findings or conclusions on the allegations contained, and the civil penalty sought, in the complaint.

(j) *Appeal.* Either party may appeal the administrative law judge's initial decision to the FAA decisionmaker pursuant to the procedures in subpart G of this part. If a party files a notice of appeal pursuant to § 13.233 of subpart G, the effectiveness of the initial decision is stayed until a final decision and order of the Administrator have been entered on the record. The FAA decisionmaker shall review the record and issue a final decision and order of the Administrator that affirm, modify, or reverse the initial decision. The FAA decisionmaker may assess a civil penalty but shall not assess a civil penalty in an amount greater than that sought in the complaint.

(k) *Payment.* A person shall pay a civil penalty by sending a certified check or money order, payable to the Federal Aviation Administration, to the agency attorney.

(l) *Collection of civil penalties.* If an individual does not pay a civil penalty imposed by an order assessing civil penalty or other final order, the Administrator may take action provided under the law to collect the penalty.

(m) *Exhaustion of administrative remedies and judicial review.* (1) Cases under the FAA statute. A party may petition for review only of a final decision and order of the FAA decisionmaker to the courts of appeals of the United States for the circuit in which the individual charged resides or has his or her principal place of business or the United States Court of Appeals for the District of Columbia Circuit, under 49 U.S.C. 46110, 46301(d)(6), and 46301(g). Neither an initial decision or order issues by an administrative law judge that has not been appealed to the FAA decisionmaker, nor an order compromising a civil penalty action, may be appealed under those sections.

(2) *Cases under the Federal hazardous materials transportation law.* A party may seek judicial review only of a final decision and order of the FAA decisionmaker involving a violation of the Federal hazardous materials transportation law or a regulation or order issued thereunder to an appropriate district court of the United States, under 5 U.S.C. 703 and 704 and 28 U.S.C. 1331. Neither an initial decision or order issued by an administrative law judge that has not been appealed to the FAA

decisionmaker, nor an order compromising a civil penalty action, may be appealed under these sections.

(n) *Compromise.* The FAA may compromise the amount of any civil penalty imposed under this section, under 49 U.S.C. 5123(e), 46031(f), 46303(b), or 46318 at any time before referring the action to the United States Attorney General, or the delegate of the Attorney General, for collection.

(1) An agency attorney may compromise any civil penalty action where a person charged with a violation agrees to pay a civil penalty and the FAA agrees not to make a finding of violation. Under such agreement, a compromise order is issued following the payment of the agreed-on amount or the signing of a promissory note. The compromise order states the following:

(i) The person has paid a civil penalty or has signed a promissory note providing for installment payments.

(ii) The FAA makes no finding of a violation.

(iii) The compromise order shall not be used as evidence of a prior violation in any subsequent civil penalty proceeding or certificate action proceeding.

(2) An agency attorney may compromise the amount of an civil penalty proposed in a notice, assessed in an order, or imposed in a compromise order.

Issued in Washington, DC, on December 23, 2004.

Rebecca MacPherson,

Assistant Chief Counsel for Regulations.

[FR Doc. 05–528 Filed 1–10–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NE–33–AD; Amendment 39–13939; AD 2005–01–14]

RIN 2120–AA64

Airworthiness Directives; Bombardier-Rotax GmbH Type 912 F, 912 S, and 914 F Series Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for Bombardier-Rotax GmbH Type 912 F, 912 S, and 914 F series reciprocating engines. That AD currently requires venting of the lubrication system and inspection of the valve train on all engines. That AD also requires venting of the lubrication system of all engines on which the lubrication system has been opened, and any engine on which the propeller has been rotated one full turn in the wrong direction. This AD requires similar actions, and also requires removing the existing part number oil dipstick from service and installing a new oil dipstick. This AD results from the need to clarify the mandated procedures for inspections and venting. This AD also results from the manufacturer discovering that under certain circumstances, the oil level in the oil tank can fall below the minimum level required to sustain proper engine lubrication. We are issuing this AD to prevent damage to the engine valve train due to inadequate venting of the lubrication system, which can result in an in-flight engine failure and forced landing.

DATES: This AD becomes effective February 15, 2005. The Director of the **Federal Register** previously approved the incorporation by reference of certain publications as listed in the regulations as of October 28, 2002 (67 FR 65033, October 23, 2002).

ADDRESSES: You can get the service information identified in this AD from Bombardier-Rotax GmbH, Gunskirchen, Austria; telephone 7246–601–423; fax 7246–601–760.

You may examine the AD docket at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Richard Woldan, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park; telephone (781) 238–7136; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with a proposed airworthiness directive (AD) to supersede AD 2002–21–16. The proposed AD applies to Bombardier-Rotax GmbH Type 912 F, 912 S, and 914 F series reciprocating engines. We published the proposed AD in the **Federal Register** on August 12, 2004 (69 FR 49829). That action proposed to do the following:

- At the next oil change, or within 100 hours TIS after the effective date of the AD, whichever is later, remove the oil dipstick, part number (P/N) 956150, from service, and install a serviceable dipstick that has a different P/N.
- Before the next engine start for engines with 50 hours or less time-in-service (TIS) on the effective date of the AD, since the engine had the oil system opened, or the oil was changed using other than specified procedures, or the propeller was rotated more than one turn in the wrong direction of rotation, inspect for valve train damage, proper venting of the lubrication system and inspect for the correct venting of the hydraulic valve tappets.
- Thereafter, for all engines, properly vent the lubrication system before starting the engine, after any of the following:
- Initial installation of a new or overhauled engine;
- Opening the oil system;
- Changing the oil using improper procedures;
- The propeller was rotated more than one turn in the wrong direction of rotation, allowing air to be ingested into the valve train components.

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are about 624 Bombardier-Rotax GmbH Type 912 F, 912 S, and 914 F series reciprocating engines of the affected design in the worldwide fleet. We estimate that 282 engines installed on aircraft of U.S. registry will be affected by this AD. We also estimate that it will take about one work hour per engine to perform one oil system inspection and venting, and that the average labor rate is $65 per work hour. Required parts will cost about $0.85 per engine. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $18,570.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''AD Docket No. 2002–NE–33–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–12923 (67 FR 65033, October 23, 2002) and by adding a new airworthiness directive, Amendment 39–13939, to read as follows:

2005–01–14 Bombardier-Rotax GmbH: Amendment 39–13939. Docket No. 2002–NE–33–AD. Supersedes AD 2002–21–16 (Amendment 39–12923).

Effective Date

(a) This airworthiness directive (AD) becomes effective February 15, 2005.

Affected ADs

(b) This AD supersedes AD 2002–21–16.

Applicability

(c) This AD applies to Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines. These engines are installed on, but not limited to, Diamond Aircraft Industries, DA20–A1, Diamond Aircraft Industries GmbH Model HK 36 TTS, Model HK 36TTC, and Model HK 36 TTC–ECO, Iniziative Industriali Italiane S.p.A. Sky Arrow 650 TC and Sky Arrow 650 TCN, Aeromot-Industria Mecanico Metalurgica ltda., Models AMT–300 and AMT–200S, and Stemme S10–VT aircraft.

Unsafe Condition

(d) This AD results from the manufacturer discovering that under certain circumstances, the oil level in the oil tank can fall below the minimum level required to sustain proper engine lubrication. The actions specified in this AD are intended to prevent damage to the engine valve train due to inadequate venting of the lubrication system, which can result in an in-flight engine failure and forced landing.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

Initial Venting and Inspection for Correct Venting

(f) Before the next engine start, for all Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines that have not been operated since doing any of the actions identified in section 1.5(a) of Rotax Mandatory Service Bulletin (MSB) SB–912–036/SB–914–022, Revision 1, dated August 2002, do the following:

(1) Perform venting of the lubrication system; and

(2) Perform inspection for correct venting of the hydraulic valve tappets. Use Section 3.1.1 through section 3.1.4 of the Accomplishment Instructions of Rotax MSB SB–912–036/SB–914–022, Revision 1, dated August 2002 to do the venting and inspection.

Inspection of Engine Valve Train

(g) Before the next engine start, for all Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines that have been operated for 50 hours or less on the effective date of this AD since doing any of the actions identified in section 1.5 (b) of Rotax MSB SB–912–036/SB–914–022, Revision 1, dated August 2002, do the following:

(1) Disassemble and perform inspection of the engine valve train; and

(2) Reassemble, vent the lubrication system, and inspect for correct venting of the hydraulic valve tappets. Use Section 3.1.5 through Section 3.1.7 of the Accomplishment Instructions of Rotax MSB SB–912–036/SB–914–022, Revision 1, dated August 2002.

Repetitive Venting of the Lubrication System

(h) Thereafter, for all Bombardier-Rotax GmbH 912 F, 912 S, and 914 F series reciprocating engines, after doing any of the actions in the following paragraphs (h)(1) through (h)(4), vent the lubrication system and inspect for correct venting of the hydraulic valve tappets before starting the engine. Use section 3.1.1 through section 3.1.4 of the Accomplishment Instructions of Rotax MSB SB–912–036/SB–914–022, Revision 1, dated August 2002 to do the venting and inspecting.

(1) The installation of a new or overhauled engine.

(2) The oil system has been opened allowing air to enter the valve train (e.g. oil pump, oil cooler, oil suction line removed which allows oil to drain from the engine oil galleries).

(3) The engine oil was changed using procedures other than those included in section 1.2 of Rotax MSB SB–912–036/SB–914–022 Revision 1, dated August 2002.

(4) The propeller was turned more than one turn in the wrong direction of rotation.

Removal of Existing Oil Dipstick From Service

(i) At the next oil change or within 100 hours time-in-service after the effective date of this AD, whichever is later, remove the oil dipstick, part number (P/N) 956150, from service, and install a dipstick that has a different P/N. Information on removing oil dipstick P/N 956150 from service can be found in Rotax MSB SB–912–040/SB–914–026, Revision 1, dated August 2003.

Prohibition of Oil Dipstick, P/N 956150

(j) After the effective date of this AD, do not use dipstick P/N 956150 after complying with paragraph (i) of this AD.

Alternative Methods of Compliance

(k) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Special Flight Permits

(l) Special flight permits are not allowed.

Material Incorporated by Reference

(m) You must use Bombardier-Rotax GmbH Mandatory Service Bulletin SB–912–036/SB–914–022 Revision 1, dated August 2002, to perform the venting and inspecting required by this AD. The Director of the Federal Register previously approved the incorporation by reference of this Mandatory Service Bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, on October 23, 2002 (67 FR 65033). You can get a copy from Bombardier-Rotax GmbH, Gunskirchen, Austria; telephone 7246–601–423; fax 7246–601–760. You can review a copy at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Related Information

(n) Austro Control airworthiness directives No. 113R1, dated August 30, 2002, and No. 116, dated September 15, 2003, and Rotax Service Instruction SI–04–1997, Revision 3, dated September 2002 also address the subject of this AD.

Issued in Burlington, Massachusetts, on January 3, 2005.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 05–486 Filed 1–10–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Ivermectin Meal

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Merial, Ltd. The NADA provides for use of ivermectin meal for the control of various species of internal parasites in horses.

DATES: This rule is effective January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7543, e-mail: *melanie.berson@fda.gov*.

SUPPLEMENTARY INFORMATION: Merial, Ltd., 3239 Satellite Blvd., Bldg. 500, Duluth, GA 30096–4640, filed NADA 141–241 for ZIMECTERIN–EZ (ivermectin) 0.6% w/w for Horses. The application provides for use of ivermectin meal for the control of various species of internal parasites in horses. The NADA is approved as of December 16, 2004, and part 520 (21 CFR part 520) is amended by adding new § 520.1194 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(ii)), this approval qualifies for 3 years of marketing exclusivity beginning December 16, 2004.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. Section 520.1194 is added to read as follows:

§ 520.1194 Ivermectin meal.

(a) *Specifications*. Each gram of meal contains 6 milligrams ivermectin (0.6 percent).

(b) *Sponsor*. See No. 050604 in § 510.600(c) of this chapter.

(c) *Special considerations*. See § 500.25 of this chapter.

(d) *Conditions of use in horses*—(1) *Amount*. Administer 136 micrograms (mcg) ivermectin per pound (/lb) body weight (300 mcg/kilogram) as a single dose on approximately 2 lb grain or sweet feed.

(2) *Indications for use*. For treatment and control of Large Strongyles (adults): *Strongylus vulgaris* (also early forms in blood vessels), *S. edentatus* (also tissue stages), *S. equinus*, *Triodontophorus* spp. including *T. brevicauda* and *T. serratus*, and *Craterostomum acuticaudatum*; Small Strongyles (adults, including those resistant to some benzimidazole class compounds): *Coronocyclus* spp. including *C. coronatus*, *C. labiatus*, and *C. labratus*, *Cyathostomum* spp. including *C. catinatum* and *C. pateratum*, *Cylicocyclus* spp. including *C. insigne*, *C. leptostomum*, *C. nassatus*, and *C. brevicapsulatus*, *Cylicodontophorus* spp., *Cylicostephanus* spp. including *C. calicatus*, *C. goldi*, *C. longibursatus*, and *C. minutus*, and *Petrovinema poculatum*; Small Strongyles (fourth-stage larvae); Pinworms (adults and fourth stage larvae): *Oxyuris equi*; Ascarids (adults and third- and fourth-stage larvae): *Parascaris equorum*; Hairworms (adults): *Trichostrongylus axei*; Large Mouth Stomach Worms (adults): *Habronema muscae*; Bots (oral and gastric stages): G*asterophilus* spp. including *G. intestinalis* and *G. nasalis*; Lungworms (adults and fourth-stage larvae): *Dictyocaulus arnfieldi*; Intestinal Threadworms (adults): *Strongyloides westeri*; Summer Sores caused by *Habronema* and *Draschia* spp. cutaneous third-stage larvae; Dermatitis caused by neck threadworm microfilariae, *Onchocerca* sp.

(3) *Limitations.* Do not use in horses intended for human consumption.

Dated: December 29, 2004.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 05–523 Filed 1–10–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Lincomycin Hydrochloride Soluble Powder

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an abbreviated new animal drug application (ANADA) filed by Cross Vetpharm Group Ltd. The ANADA provides for oral use of lincomycin soluble powder to make medicated drinking water for administration to swine for the treatment of swine dysentery or to broiler chickens for the control of necrotic enteritis.

DATES: This rule is effective January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Lonnie W. Luther, Center for Veterinary Medicine (HFV 104), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–8549, e-mail: *lonnie.luther@fda.gov*.

SUPPLEMENTARY INFORMATION: Cross Vetpharm Group Ltd., Broomhill Rd., Tallaght, Dublin 24, Ireland, filed ANADA 200–377 for LINCOMED (lincomycin hydrochloride) Soluble Powder. The application provides for oral use of lincomycin soluble powder to make medicated drinking water for administration to swine for the treatment of swine dysentery or to broiler chickens for the control of necrotic enteritis. Cross Vetpharm Group Ltd.'s LINCOMED Soluble Powder is approved as a generic copy of Pharmacia & Upjohn Co.'s LINCOMIX Soluble Powder, approved under NADA 111–636. ANADA 200–377 is approved as of December 6, 2004, and the regulations are amended in 21 CFR 520.1263c to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

FDA has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. Section 520.1263c is amended by revising paragraph (b) to read as follows:

§ 520.1263c Lincomycin hydrochloride soluble powder.

* * * * *

(b) *Sponsors.* See Nos. 000009, 046573, 054925, 059130, and 061623 in § 510.600(c) of this chapter for use as in paragraph (d) of this section.

* * * * *

Dated: December 29, 2004 .

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 05–524 Filed 1–10–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1 and 3

[Docket No.: 2004–P–034]

RIN 0651–AB76

Changes To Implement the Cooperative Research and Technology Enhancement Act of 2004

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Interim rule.

SUMMARY: The Cooperative Research and Technology Enhancement Act of 2004 (CREATE Act) amends the patent laws to provide that subject matter developed by another person shall be treated as owned by the same person or subject to an obligation of assignment to the same person for purposes of determining obviousness if three conditions are met: The claimed invention was made by or on behalf of parties to a joint research agreement that was in effect on or before the date the claimed invention was made; the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement. The United States Patent and Trademark Office (Office) is revising the rules of practice in patent cases to implement the CREATE Act.

DATES: Effective Date: December 10, 2004.

Comment Deadline Date: To be ensured of consideration, written comments must be received on or before February 10, 2005. No public hearing will be held.

ADDRESSES: Comments should be sent by electronic mail message over the Internet addressed to: *ab76comments@uspto.gov*. Comments may also be submitted by mail addressed to: Box Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA, 22313–1450, or by facsimile to (571) 273–7735, marked to the attention of Robert A. Clarke. Although comments may be submitted by mail or facsimile, the Office prefers to receive comments via the Internet. If comments are submitted by mail, the Office prefers that the comments be submitted on a DOS formatted 3½ inch disk accompanied by a paper copy.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. See the Federal eRulemaking

Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available through anonymous file transfer protocol (ftp) via the Internet (address: *http://www.uspto.gov*). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Robert A. Clarke, or Jeanne M. Clark, Senior Legal Advisors, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, by telephone at (571) 272–7704, by mail addressed to: Box Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or by facsimile to (571) 273–7735, marked to the attention of Robert A. Clarke.

SUPPLEMENTARY INFORMATION: The CREATE Act amends 35 U.S.C. 103(c) to provide that subject matter developed by another person shall be treated as owned by the same person or subject to an obligation of assignment to the same person for purposes of determining obviousness if three conditions are met: (1) The claimed invention was made by or on behalf of parties to a joint research agreement that was in effect on or before the date the claimed invention was made; (2) the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and (3) the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement. *See* Pub. L. 108–453, 118 Stat. 3596 (2004). Section 2 of the CREATE Act specifically amends 35 U.S.C. 103(c) to provide that:

(c)(1) Subject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person.

(2) For purposes of this subsection, subject matter developed by another person and a claimed invention shall be deemed to have been owned by the same person or subject to an obligation of assignment to the same person if—

(A) The claimed invention was made by or on behalf of parties to a joint research agreement that was in effect on or before the date the claimed invention was made;

(B) The claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and

(C) The application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement.

(3) For purposes of paragraph (2), the term ''joint research agreement'' means a written contract, grant, or cooperative agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention.

Section 3 of the CREATE Act provides that its amendments shall apply to any patent (including any reissue patent) granted on or after December 10, 2004. The CREATE Act provides that its amendments shall not affect any final decision of a court or the Office rendered before December 10, 2004, and shall not affect the right of any party in any action pending before the Office or a court on December 10, 2004, to have that party's rights determined on the basis of the provisions of title 35, United States Code, in effect on December 9, 2004. Since the CREATE Act also includes the amendment to 35 U.S.C. 103(c) made by section 4807 of the American Inventors Protection Act of 1999 (*see* Pub. L. 106–113, 113 Stat. 1501, 1501A–591 (1999)), the change of ''subsection (f) or (g)'' to ''one or more of subsections (e), (f), or (g)'') in 35 U.S.C. 103(c) is now also applicable to applications filed prior to December 29, 1999, that were pending on December 10, 2004.

This interim rule revises the rules of practice in title 37 of the Code of Federal Regulations (CFR) to implement the CREATE Act.

Once an examiner has established a *prima facie* case of obviousness under 35 U.S.C. 103(a), the burden of overcoming the rejection by invoking 35 U.S.C. 103(c) as amended by the CREATE Act is on the applicant. To overcome a rejection under 35 U.S.C. 103(a) based upon subject matter (whether a patent document, publication, or other evidence) which qualifies as prior art under only one or more of 35 U.S.C. 102(e), (f) or (g) via the CREATE Act, the applicant must provide a statement to the effect that the prior art and the claimed invention were made by or on the behalf of parties to a joint research agreement within the meaning of 35 U.S.C. 103(c)(3), and that the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement. 35 U.S.C. 103(c)(3) defines a ''joint research agreement'' as a written contract, grant, or cooperative agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention, that was in effect on or before the date the claimed invention (under examination or reexamination) was made. The statement must be or begin on a separate sheet and must not also be directed to other matters (§ 1.4(c)). The statement must be signed either by the applicant or by the assignee of the entire interest (as provided for under § 3.71(b)).

In addition to providing a statement, the applicant must also: (1) Amend the specification to disclose the names of the parties to the joint research agreement; and (2) either amend the specification to either set forth the date the joint research agreement was executed and a concise statement of the field of the claimed invention, or specify where (*i.e.*, by reel and frame number) this information is recorded in the assignment records of the Office. If the applicant disqualifies the subject matter relied upon by the examiner in accordance with 35 U.S.C. 103(c) as amended by the CREATE Act and the procedures set forth in this interim rule, the examiner will treat the application under examination and the 35 U.S.C. 102(e), (f), or (g) prior art as if they are commonly owned for purposes of 35 U.S.C. 103.

35 U.S.C. 103(c), as amended by the CREATE Act, continues to apply only to subject matter which qualifies as prior art under 35 U.S.C. 102(e), (f) or (g), and which is being relied upon in a rejection under 35 U.S.C. 103. If the rejection is anticipation under 35 U.S.C. 102(e), (f), or (g), 35 U.S.C. 103(c) cannot be relied upon to disqualify the subject matter in order to overcome the anticipation rejection.

Because the CREATE Act applies only to patents granted on or after December 10, 2004, the recapture doctrine may prevent the presentation of claims in reissue applications that had been amended or cancelled (*e.g.*, to avoid a rejection under 35 U.S.C. 103(a) based upon subject matter that may now be disqualified under the CREATE Act) during the prosecution of the application which resulted in the patent being reissued. *See* H.R. Rep. No. 108–425, at 6–7 (2003).

Discussion of Specific Rules

Section 1.71: Section 1.71 is amended to add new § 1.71(g). Section 1.71(g) provides that the specification may disclose or be amended to disclose the names of the parties to a joint research agreement. The application must disclose or be amended to disclose the names of the parties to a joint research agreement to invoke the ''safe harbor'' provision of 35 U.S.C. 103(c) as amended by the CREATE Act. *See* 35 U.S.C. 103(c)(2)(C). Section 1.71(g)(1) specifically provides that if the specification discloses (or is amended to disclose) the names of the parties to a joint research agreement for purposes of 35 U.S.C. 103(c)(2), the specification must also provide certain information necessary to determine the applicability of the ''safe harbor'' provision of 35 U.S.C. 103(c) (or specify where such information is recorded by reel and frame number in the assignment records of the Office). The specification must also include the name of each party to the joint research agreement because this information is required by 35 U.S.C. 103(c)(2)(C). The date the joint research agreement was executed must also be provided because this information is necessary to determine whether the ''joint research agreement * * * was in effect on or before the date the claimed invention was made'' as required by 35 U.S.C. 103(c)(2)(A). If a joint research agreement was amended to be in compliance with 35 U.S.C. 103(c) as amended by the CREATE Act, the date the amended joint research agreement was executed is the date the joint research agreement was executed for purposes of 35 U.S.C. 103(c)(2)(A) and is the date that must be provided to comply with § 1.71(g). A concise statement of the field of the claimed invention must also be provided because this information is necessary to determine whether ''the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement'' as required by 35 U.S.C. 103(c)(2)(B).

Section 1.71(g)(2) provides that an amendment under § 1.71(g)(1) must be accompanied by the processing fee set forth in § 1.17(i) if it is not filed within one of the following time periods: (1) Within three months of the filing date of a national application; (2) within three months of the date of entry of the national stage as set forth in § 1.491 in an international application; (3) before the mailing of a first Office action on the merits; or (4) before the mailing of a first Office action after the filing of a request for continued examination under § 1.114.

Section 1.71(g)(3) provides that an amendment under § 1.71(g)(1) filed after the date the issue fee is paid must also be accompanied by the processing fee set forth § 1.17(i), and that the patent may not include the names of the parties to the joint research agreement. Section 1.71(g)(3) also provides that if the patent does not include the names of the parties to the joint research agreement, the amendment to include the names of the parties to the joint research agreement will not be effective unless the patent is corrected by a certificate of correction under 35 U.S.C. 255 and § 1.322. The requirements of § 1.71(g)(3) (payment of the processing fee set forth in § 1.17(i) and correction of the patent by a certificate of correction under 35 U.S.C. 255 and § 1.322) also apply in the situation in which such an amendment is not filed until after the date the patent was granted (in a patent granted on or after December 10, 2004). It is unnecessary to file a reissue application or request for reexamination of the patent to submit the amendment and other information necessary to take advantage of 35 U.S.C. 103(c) as amended by the CREATE Act. *See* H.R. Rep. No. 108–425, at 9 (''[t]he omission of the names of parties to the agreement is not an error that would justify commencement of a reissue or reexamination proceeding'').

The submission of such an amendment remains subject to the rules of practice: *e.g.*, §§ 1.116, 1.121, and 1.312. For example, if an amendment under § 1.71(g) is submitted in an application under final rejection to overcome a rejection under 35 U.S.C. 103(a) based upon a U.S. patent which qualifies as prior art only under 35 U.S.C. 102(e), the examiner may refuse to enter the amendment under § 1.71(g) if it is not accompanied by an appropriate terminal disclaimer (§ 1.321(d)). Such an amendment may necessitate the reopening of prosecution and entry of a double patenting rejection (§ 1.116).

If an amendment under § 1.71(g) is submitted to overcome a rejection under 35 U.S.C. 103(a) based upon a U.S. patent or U.S. patent application publication which qualifies as prior art only under 35 U.S.C. 102(e), and the examiner withdraws the rejection under 35 U.S.C. 103(a), but issues an Office action containing a new double patenting rejection based upon the disqualified patent or patent application publication, the Office action can be made final (provided that the examiner introduces no other new ground of rejection that was not necessitated by either amendment or an information disclosure statement filed during the time period set forth in § 1.97(c) with the fee set forth in § 1.17(p)). The Office action is properly made final because the new double patenting rejection was necessitated by amendment of the application by applicant. This is the case regardless of whether the claims themselves have been amended.

Section 1.77: Section 1.77 is amended to provide for the names of the parties to a joint research agreement in the preferred arrangement of the specification.

Section 1.104: Section 1.104(c)(4) is amended for consistency with the amendment to 35 U.S.C. 103(c).

Section 1.109: Section 1.109 is added to set forth the conditions under which the Office will make a double patenting rejection. Section 1.109(a) contains the provisions of § 1.130(b) (with a few changes for clarity). Section 1.130(b) is being removed from § 1.130 (see discussion of § 1.130).

Section 1.109(b) provides for double patenting situations which may arise as a result of the CREATE Act. Congress recognized that this amendment to 35 U.S.C. 103(c) would result in situations in which there would be double patenting between applications not owned by the same party. *See* H.R. Rep. No. 108–425, at 5–6 (2003). Therefore, § 1.109(b) provides that a double patenting rejection will be made in an application or patent under reexamination if: (1) The application or patent under reexamination claims an invention that is not patentably distinct from an invention claimed in a non-commonly owned patent; (2) the application or patent and the non-commonly owned patent are by or on behalf of parties to a joint research agreement; and (3) the inventions claimed in the application or patent and in the non-commonly owned patent were made as a result of activities undertaken within the scope of the joint research agreement. Thus, the application or patent and the subject matter disqualified under 35 U.S.C. 103(c) as amended by the CREATE Act will be treated as commonly owned for purposes of double patenting analysis. Section 1.109(b) also provides that this double patenting rejection will be made regardless of whether the application or patent and the non-commonly owned patent have the same or a different inventive entity. Section 1.109(b) also provides that this double patenting rejection may be obviated by filing a terminal disclaimer in accordance with § 1.321(d).

Section 1.130: Section 1.130 is amended to remove and reserve § 1.130(b).

Section 1.321: Section 1.321(d) is added to provide the terminal disclaimer requirements for the double patenting situations which arise as a result of the CREATE Act. *See* H.R. Rep. No. 108–425, at 6 (the Office may require a terminal disclaimer when double patenting is determined to exist for two or more claimed inventions for any application for which the applicant takes advantage of the ''safe harbor'' provision in 35 U.S.C. 103(c) as amended by the CREATE Act). The legislative history of the CREATE Act specifically states that:

> Congress intends that parties who seek to benefit from this Act to waive the right to enforce any patent separately from any earlier patent that would otherwise have formed the basis for an obviousness-type double patenting rejection. Further, Congress intends that parties with an interest in a patent that is granted solely on the basis of the amendments made pursuant to this Act to waive requirements for multiple licenses. In other words, the requirements under current law for parties to terminally disclaim interests in patents that would otherwise be invalid on ''obviousness-type'' double patenting grounds are to apply, *mutatis mutandis*, to the patents that may be issued in circumstances made possible by this Act.

See id.

Section 1.321(d) specifically sets forth the requirements for a terminal disclaimer that is filed in a patent application or in a reexamination proceeding to obviate a double patenting rejection based upon a U.S. patent or application that is not commonly owned but was disqualified under 35 U.S.C. 103(c). First, the terminal disclaimer must comply with the provisions of §§ 1.321(b)(2) through (b)(4). Second, the terminal disclaimer must be signed by the applicant in accordance with § 1.321(b)(1) if filed in a patent application, or be signed by the patentee in accordance with § 1.321(a)(1) if filed in a reexamination proceeding. Third, the terminal disclaimer must also be signed by the patentee or by the applicant, or an attorney or agent of record, of the disqualified patent or application. Fourth, the terminal disclaimer must also include a provision that the owner of the rejected application or patent and the owner of the disqualified patent or application each: (1) Waive the right to separately enforce and license the rejected application or patent and the disqualified patent or application; (2) agree that the rejected application or patent and the disqualified patent or application shall be enforceable during the period that the rejected patent or application and the disqualified patent or application are not separately enforced and are not separately licensed; and (3) agree that such waiver and agreement shall be binding upon the owner of the rejected application or patent, its successors, or assigns, and the owner of the disqualified patent or application, its successors, or assigns.

Section 3.11: Section 3.11(c) is added to provide that the Office will record a joint research agreement or an excerpt of a joint research agreement as provided in 37 CFR part 3. Section 3.11(c) also provides that such a joint research agreement or excerpt of a joint research agreement must include the name of each party to the joint research agreement, the date the joint research agreement was executed, and a concise statement of the field of invention (see § 1.71(g)).

Section 3.31: Section 3.31(g) is added to set forth the requirements for the cover sheet required by § 3.28 seeking to record a joint research agreement or an excerpt of a joint research agreement as provided by § 3.11(c). First, the cover sheet must identify the document as a ''joint research agreement'' (preferably, in the space provided for the description of the interest conveyed or transaction to be recorded in box 3 (under ''other'') of Office form PTO–1595 (June 2004)). Second, the cover sheet must indicate the name of the owner of the application or patent (preferably, in the space provided for the name and address of the party receiving the interest in box 2 of Office form PTO–1595). Third, the cover sheet must indicate the name of every other party to the joint research agreement party (preferably, in the space provided for the name of the party conveying the interest in box 1 (providing additional names on an attached sheet if necessary) of Office form PTO–1595). Fourth, the cover sheet must indicate the date the joint research agreement was executed (preferably, in the space provided for the execution date in box 1 of Office form PTO–1595).

Rule Making Considerations

Administrative Procedure Act: Pursuant to authority at 5 U.S.C. 553(b)(B), the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office finds good cause to adopt the changes made in this interim rule without prior notice and opportunity for public comment, as such prior notice and comment procedures are contrary to the public interest in this situation. The amendments to 35 U.S.C. 103(c) in the CREATE Act apply to any patent granted on or after December 10, 2004, and thus apply to applications currently pending before the Office. The rules of practice, however, do not currently provide for the amendment of an application or the recording of joint research agreements (or excerpts of joint research agreements) to invoke the ''safe harbor'' provision of 35 U.S.C. 103(c) as amended by the CREATE Act, and do not permit the filing of the type of terminal disclaimer necessary to overcome the double patenting rejection that may arise as a result of the CREATE Act. Delay in the promulgation of the changes in this rule to provide notice and comment procedures might cause harm to those applicants whose applications are currently under a 35 U.S.C. 103 rejection which could be overcome by invoking the ''safe harbor'' provision of 35 U.S.C. 103(c) as amended by the CREATE Act. Put simply, delay in the implementation of the CREATE Act might cause harm to those applicants who need to invoke its provisions promptly to avoid a loss of patent rights.

In addition, the changes in this interim rule relate solely to the procedures to be followed in prosecuting a patent application: *i.e.*, submitting the amendment necessary to invoke the ''safe harbor'' provision of 35 U.S.C. 103(c) as amended by the CREATE Act, filing of the type of terminal disclaimer necessary to overcome the double patenting rejection that may arise as a result of the CREATE Act, and submitting joint research agreements or excerpts of joint research agreements for recording by the Office. Therefore, these rule changes involve interpretive rules, or rules of agency practice and procedure under 5 U.S.C. 553(b)(A), and prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). *See Bachow Communications Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are ''rules of agency organization, procedure, or practice'' and are exempt from the Administrative Procedure Act's notice and comment requirement); *see also Merck & Co., Inc.* v. *Kessler,* 80 F.3d 1543, 1549–50, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996) (the rules of practice promulgated under the authority of former 35 U.S.C. 6(a) (now in 35 U.S.C. 2(b)(2)) are not substantive rules (to which the notice and comment requirements of the Administrative Procedure Act apply)), and *Fressola* v. *Manbeck*, 36 USPQ2d 1211, 1215 (D.D.C. 1995) (''it is doubtful whether any of the rules formulated to govern patent and trade-mark practice are other than 'interpretative rules, general statements of policy, * * * procedure,

or practice.' '') (quoting C.W. Ooms, *The United States Patent Office and the Administrative Procedure Act,* 38 Trademark Rep. 149, 153 (1948)). Accordingly, prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law), and thirty-day advance publication is not required pursuant to 5 U.S.C. 553(d) (or any other law).

Regulatory Flexibility Act: As discussed previously, the changes in this interim rule involve rules of agency practice and procedure under 5 U.S.C. 553(b)(A), and prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). As prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553 (or any other law) for the changes in this interim rule, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required for the changes in this interim rule. *See* 5 U.S.C. 603.

Executive Order 13132: This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866: This rule making has been determined to be significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act: This rule making involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collections of information involved in this interim rule have been reviewed and previously approved by OMB under the following control numbers: 0651–0027, 0651–0031, 0651–0032, and 0651–0033. The United States Patent and Trademark Office is not resubmitting the information collections listed above to OMB for its review and approval because the changes in this notice do not affect the information collection requirements associated with these information collections.

The title, description and respondent description of each of the information collections is shown below with an estimate of the annual reporting burdens. Included in the estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. The principal impacts of the changes in this rule making are to implement the CREATE Act.

OMB Number: 0651–0027.

Title: Recording Assignments.

Form Numbers: PTO–1594 and PTO–1595.

Type of Review: Approved through June of 2005.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government, and State, Local, or Tribal Governments.

Estimated Number of Respondents: 240,345.

Estimated Time Per Response: 30 minutes.

Estimated Total Annual Burden Hours: 120,173 hours.

Needs and Uses: The Office records over 200,000 assignments or documents related to ownership of patent and trademark cases each year. The Office requires a cover sheet to expedite the processing of these documents and to ensure that they are properly recorded.

OMB Number: 0651–0031.

Title: Patent Processing (Updating).

Form Numbers: PTO/SB/08A, PTO/SB/08B, PTO/SB/17i, PTO/SB/17p, PTO/SB/21–27, PTO/SB/30–37, PTO/SB/42–43, PTO/SB/61–64, PTO/SB/64A, PTO/SB/67–68, PTO/SB/91–92, PTO/SB/96–97, PTO–2053–A/B, PTO–2054–A/B, PTO–2055–A/B, PTOL–413A.

Type of Review: Approved through July of 2006.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government and State, Local and Tribal Governments.

Estimated Number of Respondents: 2,281,439.

Estimated Time Per Response: 1 minute and 48 seconds to 8 hours.

Estimated Total Annual Burden Hours: 2,731,841 hours.

Needs and Uses: During the processing for an application for a patent, the applicant/agent may be required or desire to submit additional information to the United States Patent and Trademark Office concerning the examination of a specific application. The specific information required or which may be submitted includes: Information disclosure statements and citations, requests for extensions of time, the establishment of small entity status; abandonment and revival of abandoned applications, disclaimers, requests for expedited examination of design applications, transmittal forms, requests to inspect, copy and access patent applications, nonpublication requests, certificates of mailing or transmission, submission of priority documents and amendments.

OMB Number: 0651–0032.

Title: Initial Patent Application.

Form Number: PTO/SB/01–07, PTO/SB/13PCT, PTO/SB/16–19, PTO/SB/29 and 29A, PTO/SB/101–110.

Type of Review: Approved through July of 2006.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government, and State, Local, or Tribal Governments.

Estimated Number of Respondents: 454,287.

Estimated Time Per Response: 22 minutes to 10 hours and 45 minutes.

Estimated Total Annual Burden Hours: 4,171,568 hours.

Needs and Uses: The purpose of this information collection is to permit the Office to determine whether an application meets the criteria set forth in the patent statute and regulations. The standard Fee Transmittal form, New Utility Patent Application Transmittal form, New Design Patent Application Transmittal form, New Plant Patent Application Transmittal form, Declaration, Provisional Application Cover Sheet, and Plant Patent Application Declaration will assist applicants in complying with the requirements of the patent statute and regulations, and will further assist the USPTO in processing and examination of the application.

OMB Number: 0651–0033.

Title: Post Allowance and Refiling.

Form Numbers: PTO/SB/44, PTO/SB/50–51, PTO/SB/51S, PTO/SB/52–53, PTO/SB/56–58, PTOL–85B.

Type of Review: Approved through April of 2007.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, farms, Federal Government, and State, Local or Tribal Governments.

Estimated Number of Respondents: 223, 411.

Estimated Time Per Response: 1.8 minutes to 2 hours.

Estimated Total Annual Burden Hours: 67,261 hours.

Needs and Uses: This collection of information is required to administer the patent laws pursuant to Title 35, U.S.C., concerning the issuance of patents and related actions including correcting errors in printed patents, refiling of patent applications, requesting reexamination of a patent, and requesting a reissue patent to correct an error in a patent. The affected public includes any individual or institution whose application for a patent has been allowed or who takes action as covered by the applicable rules.

Comments are invited on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Robert J. Spar, Director, Office of Patent Legal Administration, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or to the Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington, DC 20503, (Attn: PTO Desk Officer).

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

37 CFR Part 3

Administrative practice and procedure, Inventions and patents, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 37 CFR parts 1 and 3 are amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

■ 2. Section 1.71 is amended by adding a new paragraph (g) to read as follows:

§ 1.71 Detailed description and specification of the invention.

* * * * *

(g) The specification may disclose or be amended to disclose the names of the parties to a joint research agreement (35 U.S.C. 103(c)(2)(C)).

(1) If the specification discloses or is amended to disclose the names of the parties to a joint research agreement for purposes of 35 U.S.C. 103(c)(2), the specification must also provide or be amended to provide the following information, or the location where (*i.e.*, by reel and frame number) such information is recorded in the assignment records of the Office:

(i) The date the joint research agreement was executed; and

(ii) A concise statement of the field of the claimed invention.

(2) An amendment under paragraph (g)(1) of this section must be accompanied by the processing fee set forth § 1.17(i) if not filed within one of the following time periods:

(i) Within three months of the filing date of a national application;

(ii) Within three months of the date of entry of the national stage as set forth in § 1.491 in an international application;

(iii) Before the mailing of a first Office action on the merits; or

(iv) Before the mailing of a first Office action after the filing of a request for continued examination under § 1.114.

(3) An amendment under paragraph (g)(1) of this section filed after the date the issue fee is paid must be accompanied by the processing fee set forth § 1.17(i), and the patent may not include the names of the parties to the joint research agreement. If the patent does not include the names of the parties to the joint research agreement, the amendment to include the names of the parties to the joint research agreement will not be effective unless the patent is corrected by a certificate of correction under 35 U.S.C. 255 and § 1.322.

■ 3. Section 1.77 is amended by redesignating paragraphs (b)(4) through (b)(11) as paragraphs (b)(5) through (b)(12), adding a new paragraph (b)(4), and revising paragraph (c) to read as follows:

§ 1.77 Arrangement of application elements.

* * * * *

(b) * * *

(4) The names of the parties to a joint research agreement.

* * * * *

(c) The text of the specification sections defined in paragraphs (b)(1) through (b)(12) of this section, if applicable, should be preceded by a section heading in uppercase and without underlining or bold type.

■ 4. Section 1.104 is amended by revising paragraph (c)(4) to read as follows:

§ 1.104 Nature of examination.

* * * * *

(c) * * *

(4) Subject matter which is developed by another person which qualifies as prior art only under 35 U.S.C. 102(e), (f) or (g) may be used as prior art under 35 U.S.C. 103 against a claimed invention unless the entire rights to the subject matter and the claimed invention were commonly owned by the same person or organization or subject to an obligation of assignment to the same person or organization at the time the claimed invention was made.

(i) Subject matter developed by another person and a claimed invention shall be deemed to have been commonly owned by the same person or organization, or subject to an obligation of assignment to the same person or organization in any application and in any patent granted on or after December 10, 2004, if:

(A) The claimed invention was made by or on behalf of parties to a joint research agreement that was in effect on or before the date the claimed invention was made;

(B) The claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and

(C) The application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement.

(ii) For purposes of paragraph (c)(4)(i) of this section, the term ''joint research agreement'' means a written contract, grant, or cooperative agreement entered into by two or more persons or entities for the performance of experimental, developmental, or research work in the field of the claimed invention.

* * * * *

■ 5. Section 1.109 is added to read as follows:

§ 1.109 Double patenting.

(a) A double patenting rejection will be made in an application or patent under reexamination if the application or patent under reexamination claims an invention that is not patentably distinct from an invention claimed in a commonly owned patent. This double patenting rejection will be made regardless of whether the application or patent under reexamination and the commonly owned patent have the same or a different inventive entity. A judicially created double patenting rejection may be obviated by filing a terminal disclaimer in accordance with § 1.321(c).

(b) A double patenting rejection will be made in an application or patent under reexamination if the application or patent under reexamination claims an invention that is not patentably distinct

from an invention claimed in a non-commonly owned patent by or on behalf of parties to a joint research agreement in which the inventions claimed in the application or patent under reexamination and in the other patent were made as a result of activities undertaken within the scope of the joint research agreement. This double patenting rejection will be made regardless of whether the application or patent under reexamination and the non-commonly owned patent have the same or a different inventive entity. This double patenting rejection may be obviated by filing a terminal disclaimer in accordance with § 1.321(d).

§ 1.130 [Amended]

■ 6. Section 1.130 is amended by removing and reserving paragraph (b).

■ 7. Section 1.321 is amended by adding a new paragraph (d) to read as follows:

§ 1.321 Statutory disclaimers, including terminal disclaimers.

* * * * *

(d) A terminal disclaimer, when filed in a patent application (rejected application) or in a reexamination proceeding (rejected patent) to obviate a double patenting rejection based upon a patent (disqualified patent) or application (disqualified application) that is not commonly owned but was disqualified under 35 U.S.C. 103(c) as resulting from activities undertaken within the scope of a joint research agreement, must:

(1) Comply with the provisions of paragraphs (b)(2) through (b)(4) of this section;

(2) Be signed in accordance with paragraph (b)(1) of this section if filed in a patent application or be signed in accordance with paragraph (a)(1) of this section if filed in a reexamination proceeding;

(3) Be signed by the patentee or by the applicant, or an attorney or agent of record, of the disqualified patent or application; and

(4) Include a provision that the owner of the rejected application or patent and the owner of the disqualified patent or application each:

(i) Waive the right to separately enforce and the right to separately license the rejected application or patent and the disqualified patent or application;

(ii) Agree that the rejected application or patent and the disqualified patent or application shall be enforceable only for and during such period that the rejected patent or application and the disqualified patent or application are not separately enforced and are not separately licensed; and

(iii) Agree that such waiver and agreement shall be binding upon the owner of the rejected application or patent, its successors, or assigns, and the owner of the disqualified patent or application, its successors, or assigns.

PART 3—ASSIGNMENT, RECORDING AND RIGHTS OF ASSIGNEE

■ 8. The authority citation for 37 CFR part 3 continues to read as follows:

Authority: 15 U.S.C. 1123; 35 U.S.C. 2(b)(2).

■ 9. Section 3.11 is amended by adding a new paragraph (c) to read as follows:

§ 3.11 Documents which will be recorded.

* * * * *

(c) A joint research agreement or an excerpt of a joint research agreement will also be recorded as provided in this part. A joint research agreement or excerpt of a joint research agreement submitted for recording by the Office must include the name of each party to the joint research agreement, the date the joint research agreement was executed, and a concise statement of the field of invention.

■ 10. Section 3.31 is amended by adding a new paragraph (g) to read as follows:

§ 3.31 Cover sheet content.

* * * * *

(g) The cover sheet required by § 3.28 seeking to record a joint research agreement or an excerpt of a joint research agreement as provided by § 3.11(c) must:

(1) Identify the document as a ''joint research agreement'' (in the space provided for the description of the interest conveyed or transaction to be recorded if using an Office-provided form);

(2) Indicate the name of the owner of the application or patent (in the space provided for the name and address of the party receiving the interest if using an Office-provided form);

(3) Indicate the name of each other party to the joint research agreement party (in the space provided for the name of the party conveying the interest if using an Office-provided form); and

(4) Indicate the date the joint research agreement was executed.

Dated: January 4, 2005.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 05–461 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R05–OAR–2004–IL–0003; FRL–7861–1]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to the receipt of an adverse comment, the EPA is withdrawing the November 12, 2004 (69 FR 65378), direct final rule approving a site specific revision to the sulfur dioxide emissions limits for Central Illinois Light Company's Edwards Generating Station in Peoria County, Illinois. The State of Illinois submitted this revision as a modification to the State Implementation Plan for Sulfur Dioxide on July 29, 2003. In the direct final rule, EPA stated that if adverse comments were submitted by December 13, 2004, the rule would be withdrawn and not take effect. On December 13, 2004, EPA received a comment. EPA believes this comment is adverse and, therefore, EPA is withdrawing the direct final rule. EPA will address the comment in a subsequent final action based upon the proposed action also published on November 12, 2004 (69 FR 65394). EPA will not institute a second comment period on this action.

DATES: The direct final rule published at 69 FR 65378 on November 12, 2004 is withdrawn as of January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Mary Portanova, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, Telephone: (312) 353–5954. E-Mail Address: *portanova.mary@epa.gov*.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur dioxide.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 4, 2005.

Norman Niedergang,

Acting Regional Administrator, Region 5.

■ Accordingly, the amendment to 40 CFR 52.720 published in the **Federal Register** on November 12, 2004 (69 FR 65378) on pages

65378–65381 are withdrawn as of January 11, 2005.

[FR Doc. 05–600 Filed 1–10–05; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7857–8]

New York: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: New York has applied to EPA for Final authorization of changes to its hazardous waste program under the Solid Waste Disposal Act, as amended, commonly referred to as Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for final authorization, and is authorizing the State's changes through this immediate final action. EPA is publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we get written comments which oppose this authorization during the comment period, the decision to authorize New York's changes to its hazardous waste program will take effect as provided below. If we get comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule, or the portion of the rule that is the subject of the comments, before it takes effect and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the changes.

DATES: This final authorization will become effective on March 14, 2005, unless EPA receives adverse written comment by February 10, 2005. If EPA receives such comment, it will publish a timely withdrawal of this immediate final rule or those paragraphs or sections of this rule which are the subject of the comments opposing the authorization in the **Federal Register** and inform the public that only the portion of the rule that is not withdrawn will take effect. (See Section E of this rule for further details.)

ADDRESSES: Submit your comments, identified by FRL–7857–8 by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- E-mail: *infurna.michael@epamail.epa.gov.*
- Fax: (212) 637–4437.
- Mail: Send written comments to Michael Infurna, Division of Environmental Planning and Protection, EPA, Region 2, 290 Broadway, 22nd Floor, New York, NY 10007.
- Hand Delivery or Courier: Deliver your comments to Michael Infurna, Division of Environmental Planning and Protection, EPA, Region 2, 290 Broadway, 22nd Floor, New York, NY 10007. Such deliveries are only accepted during the Regional Office's normal hours of operation. The public is advised to call in advance to verify the business hours. Special arrangements should be made for deliveries of boxed information.

You can view and copy New York's application during business hours at the following addresses: EPA Region 2 Library, 290 Broadway, 16th Floor, New York, NY 10007, Phone number: (212) 637–3185; or New York State Department of Environmental Conservation, Division of Solid and Hazardous Materials, 625 Broadway, Albany, NY 12233–7250, Phone number: (518) 402–8730. The public is advised to call in advance to verify the business hours of the above locations.

Instructions: Direct your comments to FRL–7857–8. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or e-mail. The Federal regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Michael Infurna, Division of Environmental Planning and Protection, EPA Region 2, 290 Broadway, 22nd floor, New York, NY 10007; telephone number (212) 637–4177; fax number: (212) 637–4377; e-mail address: *infurna.michael@epamail.epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

B. What Decisions Have We Made in This Rule?

We conclude that New York's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant New York final authorization to operate its hazardous waste program with the changes described in the authorization application. New York has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders (except in Indian Country) and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before the States are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in New York, including issuing permits if necessary, until the State is granted authorization to do so.

C. What Is the Effect of Today's Authorization Decision?

The effect of this decision is that a facility in New York subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. New York has enforcement responsibilities under its State hazardous waste program for violations of such program, but EPA retains its authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013, and 7003. These sections include, but may not be limited to, the authority to:

- Do inspections, and require monitoring, tests, analyses, reports or other actions;
- Enforce RCRA requirements and suspend or revoke permits;
- Take enforcement actions regardless of whether the State has taken its own actions.

This action does not impose additional requirements on the regulated community because the regulations for which New York is being authorized by today's action are already effective, and are not changed by today's action.

D. Why Wasn't There a Proposed Rule Before Today's Rule?

EPA did not publish a proposal before today's rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the proposed rules section of today's **Federal Register**, we are publishing a separate document that proposes to authorize the State program changes.

E. What Happens if EPA Receives Comments That Oppose This Action?

If EPA receives comments that oppose this authorization, we will withdraw this rule by publishing a document in the **Federal Register** before the rule becomes effective. EPA will base any further decision on the authorization of the State program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

If we receive comments that oppose only the authorization of a particular change to the State hazardous waste program, we will withdraw that part of this rule but the authorization of the program changes that the comments do not oppose will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization will become effective, and which part is being withdrawn.

F. What Has New York Previously Been Authorized For?

New York initially received final authorization effective on May 29, 1986 (51 FR 17737) to implement its base hazardous waste management program. We granted authorization for changes to its program effective July 3, 1989 (54 FR 19184), May 7, 1990 (55 FR 7896), October 29, 1991 (56 FR 42944), May 22, 1992 (57 FR 9978), August 28, 1995 (60 FR 33753), October 14, 1997 (62 FR 43111) and January 15, 2002 (66 FR 57679).

While EPA is not authorizing any new New York State civil or criminal statute in this program revision authorization, be advised that New York State has revised some of the statutory provisions which provide the legal basis for the State's implementation of the hazardous waste management program in New York State. On May 15, 2003, subdivisions 1 and 2 of section 71–2705 of the Environmental Conservation Law were amended. Amendments to subdivision 1 increased penalties for civil and administrative sanctions, while amendments to subdivision 2 increased fines for criminal sanctions.

G. What Changes Are We Authorizing With Today's Action?

On May 22, 2002, New York submitted a program revision application, seeking authorization of its changes in accordance with 40 CFR 271.21. New York's revision application includes changes to the Federal Hazardous Waste program, as well as State-initiated changes. New York made these changes to provisions that we had previously authorized, as listed in Section F. The State-initiated changes make the State's regulations more internally consistent, or make the State regulations more like the Federal language.

We now make an immediate final decision, subject to receipt of written comments that oppose this action, that New York's hazardous waste program revision and State-initiated changes satisfy all of the requirements necessary to qualify for Final authorization. Therefore, we grant New York Final authorization for the following program revisions. These provisions are analogous to RCRA regulations found in the 1999 edition of Title 40 of the CFR. The New York provisions are from the Title 6, New York Codes, Rules and Regulations (6 NYCRR), Volume A–2A, Hazardous Waste Management System, amended through April 10, 2004.

1. Program Revisions

Description of Federal Requirement (Revision Checklists [1])	Analogous State regulatory authority [2]
RCRA CLUSTER [3] VII	
Hazardous Waste Management System; Testing and Monitoring Activities (6/13/97, 62 FR 32452; Revision Checklist 158).	Title 6 New York Codes, Rules and Regulations (6 NYCRR) 370.1(e) introductory paragraph, 370.1(e)(1)(i), 370.1(e)(1)(vii)–(xiv), 370.1(e)(1)(xvii), 370.1(e)(5)(i), 370.1(e)(6)(i), 370.1(e)(8)(i), 370.1(e)(8)(v) and (vi), 373–2.27(e)(4)(i)('c'), 373–2.27(e)(6), 373–2.28(n)(4)(ii), 373–2 Appendix 33, Footnote 5, 373–3.27(e)(4)(i)('c'), 373–3.27(e)(6), 373–3.28(n)(4)(ii), 374–1.8(e)(5)(i), 374–1.8(g)(7)(i) and (ii), 374–1.8(h)(6), and 374–1 Appendix 49.
RCRA CLUSTER VIII	
Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers; Clarification and Technical Amendment (12/8/97, 62 FR 64636; Revision Checklist 163).	NYCRR 373–1.5(a)(2)(v), 373–2.2(g)(2)(iv), 373–2.5(c)(2)(vi), 373–2.27(a)(2)(iii), 373–2.27(a)(3) and (a)(4), 373–2.27(b)(21), 373–2.27(d)(1)(ii)('a')–('d'), 373–2.28(a)(2)(iii), 373–2.28(a)(3) and (a)(6), 373–2.28(k), 373–3.29(i)(3)(iii)('b'), 373–3.29(i)(3)(vii), 373–3.29(k)(1), 373–3.29(k)(2)(i)('b')('2'), 373–3.29(k)(6)(i), 373–3.29(k)(10), and 373 Appendix 55. (More stringent provisions: 373–2.29(c)(3)(iv)('b') and 373–3.29(d)(3)(iv)('b').)

Description of Federal Requirement (Revision Checklists [1])	Analogous State regulatory authority [2]
National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category (4/15/98 63 FR 18504; Revision Checklist 164).	6 NYCRR 371.1(e)(1)(xv).
Land Disposal Restrictions Phase IV—Treatment Standards for Metal Wastes and Mineral Processing Wastes (5/26/98, 63 FR 28556; Revision Checklist 167 A).	6 NYCRR 376.1(b)(xii), 376.1(c)(4), 376.3(b)(1)–(3), (5) and (6), 376.4(a)(5) and (8), 376.4(a)/Table, and 376.4(j)/Table UTS. (More stringent provisions: 376.3(b)(5)(iii).)
Land Disposal Restrictions Phase IV—Hazardous Soils Treatment Standards and Exclusions (5/26/98, 63 FR 28556; Revision Checklist 167 B).	6 NYCRR 376.1(b)(1)(xiv), 376.1(g)(1)(i)–(g)(1)(iii)('b'), 376.1(g)(1)(iv), 376.1(g)(1)(iv)/Table, 376.1(g)(1)(v) and (vi), 376.1(g)(2)(i)–(g)(2)(iii), 376.1(g)(2)(iv) introductory paragraph, 376.1(g)(5), 376.4(e)(8)(iii)–(v) and 376.4(k)(1)–(5).
Land Disposal Restrictions Phase IV—Corrections (5/26/98, 63 FR 28556, as amended 6/8/98, 63 FR 31266; Revision Checklist 167 C).	6 NYCRR 376.1(d)(1)(ii)('b') and ('c'), 376.1(g)(1)(vii), 376.1(g)(2)(iii)('b')/Table, 376.1(g)(2)(iv)('d') and ('e'), 376.1(g)(2)(v) and (vi), 376.4(a)(5), 376.4(a)/Table, 376.4(c)(1), 376.4(g)(1) introductory paragraph, 376.4(g)(4)(iii) and (iv), and 376.4(j)/table.
Land Disposal Restrictions Phase IV—Bevill Exclusion Revisions and Clarifications (5/26/98, 63 FR 28556; Revision Checklist 167 E).	6 NYCRR 371.1(d)(1)(ii)('a') and ('c'), 371.1(e)(2)(vi) introductory paragraph through (vi)('b')('20') and 371.1(e)(2)(vi)('c'). 2.28(m)(2)(ii) and (iii), 373–2.28(o)(7)(vi), 373–2.28(o)(13), 373–2.29(a)(2)(i), 373–2.29(a)(3), 373–2.29(c)(2), 373–2.29(c)(3)(ii)('i'), 373–2.29(c)(3)(iii), 373–2.29(c)(3)(iv)('b'), 373–2.29(d)(1)(ii), 373–2.29(d)(2)(i), 373–2.29(e)(3)(ii)('c') introductory paragraph, 373–2.29(e)(3)(ii)('c')('2'), 373–2.29(e)(5)(iv), 373–2.29(e)(6)(iii)('a')('4')('iv'), 373–2.29(e)(6)(iii)('c'), 373–2.29(e)(6)(iv), 373–2.29(e)(10)(ii)('c'), 373–2.29(f)(2)(ii), 373–2.29(f)(4)(i)('c'), 373–2.29(f)(4)(ii)('a')('2'), 373–2.29(f)(5)(ii)('c'), 373–2.29(g)(3)(ii), 373–2.29(g)(3)(iv)('a'), 373–2.29(g)(4)(ii) and (iv)('a'), 373–2.29(g)(7), 373–2.29(h)(3)(iii)('b'), 373–2.29(h)(3)(vii), 373–2.29(j)(1), 373–2.29(j)(2)(i)('b')('2'), 373–2.29(j)(6)(i), 373–2.29(j)(10), 373–3.2(f)(2)(iv), 373–3.5(c)(2)(vi), 373–3.27(a)(2)(iii), 373–3.27(a)(3), 373–3.27(d)(1)(ii), 373–3.27(d)(6)(ii)('f')('2'), 373–3.28(a)(2)(iii), 373–3.28(a)(5), 373–3.28(k), 373–3.28(m)(2)(ii) and (iii), 373–3.28(o)(7)(vi), 373–3.28(o)(13), 373–3.29(a)(2)(i) and (a)(3), 373–3.29(b)(11) and (c), 373–3.29(d)(2), 373–3.29(d)(3)(ii)('a') and ('i'), 373–3.29(d)(3)(iii), 373–3.29(d)(3)(iv)('b'), 373–3.29(e)(1)(ii), 373–3.29(e)(1)(iii)('b')('2'), 373–3.29(e)(1)(iii)('c') introductory paragraph and ('1'), 373–3.29(e)(1)(iii)('c')('6'), 373–3.29(e)(1)(iii)('c')('7') introductory paragraph and ('i'), 373–3.29(e)(1)(iii)('d') and ('e'), 373–3.29(e)(1)(iv)('d'), 373–3.29(e)(2)(i), 373–3.29(e)(2)(iii)('b')('2'), 373–3.29(e)(2)(iii)('c') introductory paragraph, 373–3.29(e)(2)(iii)('c')('6') and ('7'), 373–3.29(e)(2)(iii)('d') and ('e'), 373–3.29(e)(2)(viii)('c'), 373–3.29(e)(2)(ix)('d'), 373–3.29(e)(4)(v)('b'), 373–3.29(f)(3)(ii)('c') introductory paragraph, 373–3.29(f)(3)(ii)('c')('2'), 373–3.29(f)(5)(iv), 373–3.29(f)(6)(iii)('a')('4')('iv'), 373–3.29(f)(6)(iv), 373–3.29(f)(10)(ii)('c'), 373–3.29(g)(2)(ii), 373–3.29(g)(4)(i)('c'), 373–3.29(g)(4)(ii)('a')('2'), 373–3.29(g)(5)(ii)('c'), 373–3.29(h)(3)(iv)('a'), 373–3.29(h)(4)(iv)('a'), 3733.29(h)(7), 373–
Land Disposal Restrictions Phase IV—Exclusion of Recycled Wood Preserving Wastewaters (5/26/98, 63 FR 28556; Revision Checklist 167 F).	6 NYCRR 371.1(e)(1)(ix)('c').
Hazardous Waste Combustors; Revised Standards; Part 1: RCRA Comparable Fuel Exclusion; Permit Modifications for Hazardous Waste Combustion Units; Notification of Intent To Comply; Waste Minimization and Pollution Prevention Criteria for Compliance Extensions (6/19/98, 63 FR 33782; Checklist 168).	6 NYCRR 371.1(e)(1)(xvii), 371.4(i), 373–1.3(g)(2)(viii), 373–1.7(c)(12)(iii), 373–1.7(j) introductory paragraph, and 371.7(j)(1). (More stringent provisions: 373–1.7(c)(12)(iii).)
RCRA CLUSTER IX	
Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Petroleum Refining Process Wastes; Land Disposal Restrictions for Newly Identified Wastes; and CERCLA Hazardous Substance Designation and Reportable Quantities (8/6/98, 63 FR 42110, as amended 10/9/98, 63 FR 54356; Revision Checklist 169).	6 NYCRR 371.1(d)(1)(ii)('d')('3'), 371.1(d)(3)(ii)('b')('2'), 371.1(d)(3)(ii)('b')('5'), 371.1(e)(1)(xii)('a') and ('b'), 371.1(e)(1)(xvii)–(xviii), 371.1(g)(1)(iii)('d')('3'), 371.1(g)(1)(iii)('e'), 371.4(b)(1), 371.4(c), and 371 Appendix 22, 374–1.8(a)(2)(iii), 376.2(a) and (b), 376.3(d)(1), and 376.4(a).
Hazardous Waste Recycling; Land Disposal Restrictions (8/31/98, 63 FR 46332; Revision Checklist 170).	6 NYCRR 370.1(e)(2)(v) and 376.4(a)(9).

Description of Federal Requirement (Revision Checklists [1])	Analogous State regulatory authority [2]
Emergency Revision of the Land Disposal Restrictions (LDR) Treatment Standards for Listed Hazardous Wastes from Carbamate Production (9/4/98, 63 FR 47410; Revision Checklist 171).	6 NYCRR 376.4(a)(7), 376.4(a)(9), 376.4/Table and 376.4(j)(1)/Table UTS.
Characteristic Slags Generated From Thermal Recovery of Lead by Secondary Lead Smelters; Land Disposal Restrictions; Extension of Compliance Date (9/9/98, 63 FR 48124; Revision Checklist 172).	6 NYCRR 376.3(b)(2), (3), (5) and (6).
Land Disposal Restrictions: Treatment Standards for Spent Potliners from Primary Aluminum Reduction (K088) (9/24/98, 63 FR 51254; Revision Checklist 173).	6 NYCRR 376.3(g)(3) and 376.4(a)/Table.
Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities: Post-Closure Permit Requirement and Closure Process (10/22/98, 63 FR 56710; Revision Checklist 174).	6 NYCRR 373–1.2(e) introductory paragraph and (e)(3), 373–1.5(a)(1), 373–1.5(o), 373–2.6(a)(5) and (6), 373–2.7(a)(3), 373–2.7(c)(2)(viii), 373–2.7(c)(3)(ii)('d'), 373–2.7(h)(2)(iv), 373–2.7(h)(4)(ii)('d'), 373–2.8(a)(4), 373–3.6(a)(6), 373–3.7(a)(3) and (a)(4), 373–3.7(c)(2)(viii), 373–3.7(c)(3)(i)('d'), 373–3.7(h)(3)(iv) and (v), 373–3.7(h)(4)(i)('c'), 373–3.7(k), and 373–3.8(a)(4).
Hazardous Remediation Waste Management Requirements (HWIR Media) (11/30/98, 63 FR 65874; Revision Checklist 175).	6 NYCRR 370.2(b)(37), 370.2(b)(70), 370.2(b)(124), 370.2(b)(157)–(b)(159), 370.2(b)(179), 373–1.3(h)(1), 373–1.4(a)(5)(iv)('a') and ('b'), 373–1.7(c)(15), 373–1.9(e), 373–1.11, 373–2.1(a)(9), 373–2.5(c)(2)(xvii), 373–2.6(l)(4), 373–2.19(a)(1), 373–2.19(b)(1), 373–2.19(c), 373–3.1(a)(2), 376.1(b)(1)(iii), 376.5(a)(7), 621.3, 621.6, 621.7(a), (c) and (d), 621.9(a)(2), 621.13, and 621.14. (More stringent provisions: 373–1.7(c)(15), 373–1.11(b)(2)(iii) and (b)(2)(iv), 373–1.11(d)(4)(i) intro.–(d)(4)(i)('e'), 373– 1.11(e)(1)(i)–(iii) introductory paragraph, 373–1.11(e)(1)(iv) and (vii), 373–1.11(f)(3)(i), 373–1.11(g)(1)(iii), 621.6, 621.13, 621.14.)
Universal Waste Rule (Hazardous Waste Management System; Modification of the Hazardous Waste Recycling Regulatory Program) (12/24/98, 63 FR 71225; Revision Checklist 176).	6 NYCRR 374–1.7(a)(1), 374–1.7(a)(1)/Table, 374–1.7(a)(2) and 374–3.1(i)(9).
Hazardous Waste Treatment, Storage, and Disposal Facilities and Hazardous Waste Generators; Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers (1/21/99, 64 FR 3382; Revision Checklist 177).	6 NYCRR 373–1.1(d)(1)(iii)('c')('1'), 373–2.27(b)(12), 373–2.27(b)(25), 373–2.27(b)(30), 373–2.29(a)(2)(v), 373–2.29(d)(1)(i)('a') and ('b'), 373–2.29(d)(2)(i)('a') and ('b'), 373–2.29(e)(8)(iii), 373–2.29(g)(5)(vi), 373–3.29(a)(2)(v), 373–3.29(e)(1)(i)('a') and ('b'), 373–3.29(e)(1)(iii)('b')('2') and ('4'), 373–3.29(e)(1)(iii)('c'), 373–3.29(e)(2)(i)('a') and ('b'), 373–3.29(e)(2)(iii)('b')('2') and ('4'), 373–3.29(e)(2)(iii)('c'), 373–3.29(f)(8)(iii), and 373–3.29(h)(5)(vi).
Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Petroleum Refining Process Wastes; Exemption for Leachate from Non-Hazardous Waste Landfills (2/11/99, 64 FR 6806; Revision Checklist 178).	6 NYCRR 371.1(e)(2)(xiii).
Land Disposal Restrictions—Phase IV: Treatment Standards for Wood Preserving Wastes, Treatment Standards for Metal Wastes, Zinc Micronutrient Fertilizers, Carbamate Treatment Standards, and K088 Treatment Standards (5/11/99, 64 FR 25408; Revision Checklist 179).	6 NYCRR 371.1(c)(4)(iii), 371.1(c)(4) Table 1, 371.1(c)(6)(i)('c'), 371.1(e)(2)(vi)('c'), 371.1(e)(2)(vi)('c')('1'), 372.2(a)(8)(iii)('d'), 376.1(b)(1)(viii), 376.1(b)(1)(xiv), 376.1(g)(1)(iv)/Table, 376.1(g)(2)(iii)('b')/Table, 376.1(g)(2)(iv)('d'), 376.1(h)(4)(ii), 376.1(h)(4)(ii)('a'), 376.4(a)(9) and (a)(10), 376.4(a)/Table TSHW, (j)(1) and 376.1(k)(3)(iii).
Guidelines for Establishing Test Procedures for the Analysis of Oil and Grease and Non-Polar Material Under the Clean Water Act and Resource Conservation and Recovery Act (5/14/99, 64 FR 26315; Revision Checklist 180).	6 NYCRR 370.1(e)(8)(i) and (vii).
RCRA CLUSTER X	
Hazardous Waste Management System; Modification of the Hazardous Waste Program; Hazardous Waste Lamps (7/6/99, 64 FR 36466; Revision Checklist 181).	6 NYCRR 370.2(b)(109), 370.2(b)(206), 371.1(j)(1)(ii)–(j)(1)(iv), 373–1.1(b)(4)(ii)–(b)(4)(iv), 373–2.1(a)(7)(ii)–(iv), 373–3.1(a)(9)(ii)–(vi), 374–3.1(a)(1)(ii)–(iv), 374–3.1(b)(1)(i), 374–3.1(b)(2)(ii) and (iii), 374–3.1(c)(1), 374–3.1(d)(1), 374–3.1(e)–(h), 374–3.1(i)(5) and (6), 374–3.1(i)(9), 374–3.1(i)(11), 374–3.2(a), 374–3.2(d)(4), 374–3.2(e)(5), 374–3.3(a), 374–3.3(b)(2)(iv), 374–3.3(c)(2)(v), 374–3.3(d)(4), 374–3.3(e)(5), 374–3.4(a), 374–3.5(a), 374–3.7(b)(1) and 376.1(a)(10)(ii)–(iv).

[1] A Revision Checklist is a document that addresses the specific changes made to the Federal regulations by one or more related final rules published in the FEDERAL REGISTER. EPA develops these checklists as tools to assist States in developing their authorization applications and in documenting specific State analogs to the Federal Regulations. For more information see EPA's RCRA State Authorization Web page at *http://www.epa.gov/epaoswer/hazwaste/state*.

[2] The New York provisions are from the Title 6 of the New York Codes, Rules and Regulations (6 NYCRR), as amended through April 10, 2004.

[3] A RCRA ''Cluster'' is a set of Revision Checklists for Federal rules, typically promulgated between July 1 and June 30 of the following year.

2. State-Initiated Changes

Except for the changes at 6 NYCRR §§ 372.3(a)(5) and 372.3(a)(7)(i)–(ii), the State-initiated changes correct typographical and printing errors, clarify and make the State's regulations more internally consistent, or make the State regulations more like the Federal language. At 6 NYCRR § 372.3(a)(5) and 372.3(a)(7)(i)–(ii), the State was required to remove and revise language as a result of a lawsuit in Federal court which determined that New York State could not limit the ability of a transporter to mix loads. While this change results in making the State provision more like the Federal, it is a special case and warranted distinction from the other State-initiated changes.

EPA grants New York Final authorization to carry out the following provisions of the State's program in lieu of the Federal program. The New York provisions are from the Title 6, New York Codes, Rules and Regulations (6 NYCRR), Volume A–2A, Hazardous Waste Management System, amended through April 10, 2004.

Part 370—Hazardous Waste Management System—General: Sections 370.1(e)(1)(xvii) and 370.4(a)(1) and (b)(1).

Part 371—Identification and Listing of Hazardous Waste: Sections 371.1(a)(10), (c)(4) Table 1, (d)(1)(ii)('a') and Appendix 24, Table 2.

Part 372—Hazardous Waste Manifest System and Related Standards or Generators, Transporters and Facilities: Sections 372.3(a)(5), (a)(7)(i) and (ii), 372.5(d)(6), 372.7(b)(3), (c)(1)(ii), (c)(1)(iii)('b')('2') and (c)(2).

Part 373, Subpart 373–1—Hazardous Waste Treatment, Storage and Disposal Facility Permitting Requirements: Sections 373–1.1(d)(1)(viii), (d)(2)(i)('b') and (d)(2)(iii)('b').

Part 373, Subpart 373–3—Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities: Section 373–3.2(j)(4).

H. Where Are the Revised State Rules Different From the Federal Rules?

New York hazardous waste management regulations are more stringent than the corresponding Federal regulations in a number of different areas. The more stringent provisions are being recognized as a part of the Federally-authorized program and are Federally enforceable. The specific more stringent provisions are noted on the chart in Section G and in the State's authorization application, and include, but are not limited to, the following:

1. At 6 NYCRR §§ 373–2.29(c)(3)(iv)('b') and 373–3.29(d)(3)(iv)('b'), New York requires State approval subsequent to approval by U.S. EPA of an equivalent treatment method (40 CFR 264.1082(c)(4)(ii) and 265.1083(c)(4)(ii)).

2. At 6 NYCRR 373–1.11, New York has adopted and is seeking authorization for Remedial Action Plans (40 CFR part 270, subpart H (270.79 through 270.230)) introduced by the November 30, 1998, final rule (63 FR 65874; Revision Checklist 175). However, the Uniform Procedures Act at 6 NYCRR Part 621 implements a permitting process, applicable to all RCRA permits including RAPs, that is different and in some aspects more stringent than the federal permitting procedure. For example:

a. At 6 NYCRR §§ 373–1.11(d)(4)(i)('b') and ('c'), pursuant to the Public notice and comment procedures at 6 NYCRR § 621.6, New York requires a permit applicant to complete public notice requirements that are assigned to the permitting agency in the Federal program (40 CFR 270.145(a)(2) and (3)).

b. The Department may choose to modify, revoke, reissue or terminate a final RAP or deny a renewal application for the reasons listed at 6 NYCRR § 373–1.11(e)(1)(iii) and the additional reasons listed at 6 NYCRR § 621.14 (40 CFR 270.175(a)).

3. At 6 NYCRR § 373–1.11(f)(3)(i), New York requires the owner or operator to submit the request for transferring the Remedial Action Plan to a new owner or operator at least 180 days in advance (40 CFR 270.220(a)).

We consider the following State requirements to be beyond the scope of the Federal program:

1. New York did not adopt an analog to 40 CFR 261.4(g) that excludes certain dredged materials from the State definition of hazardous waste (November 30, 1998, final rule, 63 FR 65874; Revision Checklist 175). Instead, the State subjects these materials to full regulation as hazardous wastes.

2. New York State regulations do not incorporate the Mineral Processing Secondary Materials Exclusion at 40 CFR 261.4(a)(17) (originally introduced at 261.4(a)(16)) and the changes affecting 40 CFR 261.2(c)(3) and (c)(4)/Table, and 261.2(e)(1)(iii) addressed by the May 26, 1998, final rule (63 FR 28556; Revision Checklist 167D). Since New York did not adopt the exclusion at 40 CFR 261.4(a)(17) the State will have a broader in scope program because the effect is to include materials that are not considered solid waste by EPA.

Broader-in-scope requirements are not part of the authorized program and EPA cannot enforce them. Although you must comply with these requirements in accordance with State law, they are not RCRA requirements.

Finally, at 6 NYCRR 376.4(e) New York has adopted but is not seeking authorization for 40 CFR 268.44 which contains two types of variances. New York has left the authority with EPA to review and approve the non-delegable general treatment standard variances at 40 CFR 268.44(a)–(g) as well as the delegable site-specific variances at 40 CFR 268.44(h)–(m). However, New York is more stringent because it requires the State to review and approve treatment variances subsequent to EPA approval. Note that New York has also adopted, but is not seeking authorization for the amendments to both types of treatment variances addressed by the December 5, 1997 final rule (62 FR 64504; Revision Checklist 162).

I. Who Handles Permits After the Authorization Takes Effect?

New York will issue permits for all the provisions for which it is authorized and will administer the permits it issues. EPA will continue to administer any RCRA hazardous waste permits or portions of permits which we issued prior to the effective date of this authorization, and also to process permit modification requests for facilities with existing permits. EPA will not issue any more new permits or new portions of permits for the provisions listed in the Table above after the effective date of this authorization. Pursuant to § 3006(g)(1) of RCRA, EPA may continue to issue or deny permits to facilities within the State to implement those regulations promulgated under the authority of HSWA for which New York is not authorized.

J. How Does Today's Action Affect Indian Country (18 U.S.C. 115) in New York?

The State of New York's Hazardous Waste Program is not authorized to operate in Indian country within the State. Therefore, this action has no effect on Indian country. EPA will continue to implement and administer the RCRA program in these lands.

K. What Is Codification and Is EPA Codifying New York's Hazardous Waste Program as Authorized in This Rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. We do this by referencing the authorized State rules in 40 CFR part 272. If this rule takes effect,

or we finalize the companion proposal to authorize the State's changes to its hazardous waste program, we may, at a later date, amend 40 CFR part 272, subpart HH to codify New York's authorized program.

L. Statutory and Executive Order Reviews

This rule only authorizes hazardous waste requirements pursuant to RCRA 3006 and imposes no requirements other than those imposed by State law. Therefore, this rule complies with applicable executive orders and statutory provisions as follows.

1. *Executive Order 12866: Regulatory Planning Review*—The Office of Management and Budget has exempted this rule from its review under Executive Order 12866 (56 FR 51735, October 4, 1993).

2. *Paperwork Reduction Act*—This rule does not impose an information collection burden under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

3. *Regulatory Flexibility Act*—After considering the economic impacts of today's rule on small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), I certify that this rule will not have a significant economic impact on a substantial number of small entities.

4. *Unfunded Mandates Reform Act*—Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act (Pub. L. 104–4).

5. *Executive Order 13132: Federalism*—Executive Order 12132 (64 FR 19885, April 23, 1997) does not apply to this rule because it will not have federalism implications (*i.e.*, substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government).

6. *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*—Executive Order 13175 (65 FR 67240, November 6, 2000) does not apply to this rule because it will not have tribal implications (*i.e.*, substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes).

7. *Executive Order 13045: Protection of Children from Environmental Health & Safety Risks*—This rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant and it is not based on health or safety risks.

8. *Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*—This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action as defined in Executive Order 12866.

9. *National Technology Transfer Advancement Act*—EPA approves State programs as long as they meet criteria required by RCRA, so it would be inconsistent with applicable law for EPA, in its review of a State program, to require the use of any particular voluntary consensus standard in place of another standard that meets the requirements of RCRA. Thus, section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note) does not apply to this rule.

10. *Congressional Review Act*—EPA will submit a report containing this rule and other information required by the Congressional Review Act (5 U.S.C. 801 *et seq.*) to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This action will be effective on March 14, 2005.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended (42 U.S.C. 6912(a), 6926, 6974(b)).

Dated: November 23, 2004.

Kathleen C. Callahan,

Acting Regional Administrator, Region 2.

[FR Doc. 05–504 Filed 1–10–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222, 224 and 226

[Docket No. 041221357–4357–01; I.D. 113004A]

RIN 0648–AS94

Endangered Marine and Anadromous Species; Final Rule to Remove Technical Revisions to Right Whale Listing Under the U.S. Endangered Species Act

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to remove two technical revisions made in an April 2003 final rule to the northern right whale (Eubalaena sp.) listing under the Endangered Species Act (ESA). The technical revisions purported to change: the way right whales are listed by splitting the endangered northern right whale into two separate endangered species - North Pacific right whale and North Atlantic right whale; the definition of ''right whale'' as it applies to the right whale approach regulations; and the section heading for right whale critical habitat. NMFS has determined that issuance of the 2003 final rule did not comply with the requirements of the ESA. This final rule corrects these mistakes by removing these technical revisions to 50 CFR and reinstating the language that existed before April 2003.

DATES: This rule takes effect on January 11, 2005.

ADDRESSES: Supporting documentation is available by request from the Chief, Endangered Species Division, NMFS, 1315 East-West Highway, F/PR3, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Marta Nammack, NMFS, Endangered Species Division, (301) 713–1401, ext. 180.

SUPPLEMENTARY INFORMATION:

Background

Right Whale Listing

From 1970 through 1975 the endangered and threatened species lists maintained by NMFS (50 CFR 224.101(b)) and the U.S. Fish and Wildlife Service (FWS) both identified endangered right whales as ''Right whales (*Eubalaena* spp.).'' In 1980 the FWS list identified the listing as ''Whale, right...*Balaena glacialis*'' and in

1993, as ''Whale, right...*Balaena glacialis* (inc. australis),'' but the NMFS list continued to identify the listed entities as ''Right whales (*Eubalaena* spp.).'' Through the years taxonomists have had different opinions on the proper genus name for right whales and on the number of species of right whales, but NMFS interpreted the listing to mean that two separate species were listed as endangered: northern right whale (*Eubalaena glacialis*) and southern right whale (*Eubalaena australis*). This was consistent with the view of most taxonomists at the time of listing.

April 2003 Technical Revision

On April 10, 2003, NMFS (henceforth, we) published a final rule (68 FR 17560) that purported to split the single endangered northern right whale species listed in 50 CFR 17.11 (Whale, right - *Balaena glacialis*) into two endangered species - North Atlantic right whale (Eubalaena glacialis) and North Pacific right whale (*Eubalaena japonica*). The intent of replacing the genus *Balaena* with *Eubalaena* was to correct the genus name in the FWS listing, a technical change. The intent of changing the listing from one northern right whale species to two species North Pacific right whale and North Atlantic right whale was to recognize the best available scientific information, which indicated that the population in the North Atlantic was genetically distinct from the population in the North Pacific. At the time, we considered this second change also to be a technical change that did not require a notice and comment period. We did not make the same change to 50 CFR 224.101(b) because we believed that ''Right whales (*Eubalaena* spp)'' would already include any species that is subsequently recognized within the same genus.

To be consistent with the changes described above, we also amended: (1) the definition of ''right whale'' in 50 CFR 222.102 so that the approach regulations in 50 CFR 224 would apply only to western North Atlantic right whales; and (2) the heading of 50 CFR 226.203 to indicate that critical habitat was designated only for the North Atlantic right whale.

The technical revision did not purport to affect the status or taxonomy of the southern right whale.

ESA Section 4 Listing Procedure

The process for determining whether species should be added to the Federal list of threatened and endangered species under the ESA is specified in section 4 of the ESA and informed by the definition of ''species,'' ''endangered species,'' and ''threatened species'' found in section 3. However, the final rule we published in April 2003 was procedurally and substantively flawed. First, we did not follow the public notice and comment procedural requirements outlined in section 4 for listing a species as endangered or threatened. Second, we did not meet the ESA's substantive requirements of conducting a review of the status of the species to determine whether each species is endangered or threatened as a result of any of the five listing factors in that section.

In addition, we did not have the authority to make any changes to 50 CFR 17.11 because 50 CFR part 17 is solely within the jurisdiction of the FWS. Because we did not have the authority to amend 50 CFR 17.11, the changes we purported to make in that part are not valid. The status of right whales reverts to the pre-April 2003 status such that all right whales are endangered either as *Eubalaena glacialis* (Northern right whales) or *Eubalaena australis* (Southern right whales). We will request that FWS remove the changes to eliminate confusion regarding the listed entities.

Final Rule

We also are removing the April 2003 technical revisions to 50 CFR 222.102 and 50 CFR 226.203 so that they revert to the pre-April 2003 language. This will amend the definition of ''right whale'' as used in the right whale approach regulations found at 50 CFR 224 to read, ''*Right whale* means, as used in § 224.103(c), any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).'' This will also amend the heading in 50 CFR 226.203 to read, ''§ 226.203 Critical Habitat for northern right whales--Northern Right Whale (*Eubalaena glacialis*).'' For the sake of consistency, we are also changing the heading of 50 CFR 224.103(c) from ''*Approaching North Atlantic right whales*—(1) *Prohibitions*'' to ''*Approaching right whales*—(1) *Prohibitions*.''

Next Steps under Section 4

In order to be eligible for listing under the ESA as either endangered or threatened, a group of organisms must constitute a ''species,'' which the ESA defines to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.'' Under section 4 of the ESA, the listing determination must be made ''solely on the basis of the best scientific and commercial data available.'' When considering a species for listing under the ESA, NMFS considers whether a species is endangered or threatened as a result of any of five statutorily enumerated factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence.

We plan to conduct a status review of the northern right whale to determine whether it consists of more than one species as defined by the ESA. If we make that determination, we will evaluate the status of each species to determine whether it is endangered or threatened as a result of any of the five listing factors, publish a summary of our conclusions regarding the listing factors, and, if warranted, publish a proposed rule to list each entity in accordance with section 4 of the ESA and 50 CFR 424.16. In addition, the notice of a proposed rule to list any species would contain the complete text of the proposed rule, a summary of the data on which the proposed rule is based (including, as appropriate, citation to pertinent information sources), and the relationship of such data to the proposed rule.

In addition, section 4(a)(3) of the ESA requires that, to the maximum extent prudent and determinable, critical habitat be designated for a species concurrent with making a determination that it is endangered or threatened. Therefore, if we determine that we should list species of right whales different from the northern right whale, we will also designate, to the maximum extent prudent and determinable, any habitat determined to be critical habitat of each of the new species proposed for listing. We will issue proposed and final rules to make the necessary determinations regarding critical habitat for any new species to be listed. We plan to complete this process by the end of 2006.

Classification

Administrative Procedure Act

The Assistant Administrator for Fisheries, NMFS, finds good cause exists to waive the requirement for prior notice and the opportunity for comment pursuant to 5 U.S.C. 553(b)(B) as well as the requirement for a delay in the effective date pursuant to 5 U.S.C. 553(d)(3). Such procedures are unnecessary because this rule merely

removes changes in the CFR that are not valid because they were never promulgated properly.

Executive Order 13132 - Federalism

Executive Order 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this rule.

Executive Order 12866

This final rule is exempt from review under Executive Order 12866.

Regulatory Flexibility Act

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

List of Subjects

50 CFR Part 222

Administrative practice and procedure, endangered and threatened species, exports, imports, reporting and recordkeeping requirements, transportation.

50 CFR Part 224

Administrative practice and procedure, endangered and threatened marine species, exports, imports, reporting and recordkeeping requirements, transportation.

50 CFR Part 226

Endangered and threatened species.

Dated: January 4, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR parts 222, 224 and 226 are amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

■ 1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

■ 2. In § 222.102, the definition for ''Right whale'' is revised to read as follows:

§ 222.102 Definitions.

* * * * *

Right whale means, as used in § 224.103(c), any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).

* * * * *

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 3. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 4. In § 224.103, section heading of paragraph (c) is revised to read as follows:

§ 224.103 Special prohibitions for endangered marine mammals.

* * * * *

(c) *Approaching right whales*—(1) *Prohibitions.*

* * * * *

PART 226—DESIGNATED CRITICAL HABITAT

■ 5. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 6. In § 226.203, the section heading and the introductory text are revised to read as follows:

§ 226.203 Critical habitat for northern right whales.

Northern Right Whale (*Eubalaena glacialis*)

* * * * *

[FR Doc. 05–527 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 7
Tuesday, January 11, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 213 and 315

RIN 3206–AK58

Excepted Service—Appointment for Persons With Disabilities and Career and Career-Conditional Employment

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing changes to existing regulations regarding the excepted appointments of persons with mental retardation, severe physical, and psychiatric disabilities. These changes will provide agencies the authority to determine, on a case-by-case basis, whether these individuals can receive an excepted appointment based solely on medical documentation submitted by the applicant. We also propose to consolidate three excepted appointing authorities for persons with the above disabilities into one authority.

DATES: We will consider comments received on or before March 14, 2005.

ADDRESSES: You may submit comments, identified by RIN number, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *employ@opm.gov.* Include ''RIN 3206–AK58'' in the subject line of the message.
- Fax: (202) 606–2329.
- Mail: Mark Doboga, Deputy Associate Director for Talent and Capacity Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street, NW., Washington, DC 20415–9700.
- Hand Delivery/Courier: OPM, Room 6551, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Larry Lorenz by telephone on (202) 606–0960, by fax on (202) 606–2329, by TDD on (202) 418–3134, or by e-mail at *employ@opm.gov.*

SUPPLEMENTARY INFORMATION: In February 2001, President George W. Bush introduced the New Freedom Initiative (*http://www.whitehouse.gov/news/freedominitiative/freedominitiative.html*) to eliminate ''the barriers to equality that face many of the 54 million Americans with disabilities.'' In so doing, the President stated that persons with disabilities ''should have every freedom to pursue careers, integrate into the workforce, and participate as full members in the economic marketplace.''

To further the objectives of the New Freedom Initiative, OPM reviewed the regulations governing the appointment of persons with disabilities to positions in the Federal Government. At present, those regulations permit agencies to make expedited Schedule A ''excepted'' appointments to persons with disabilities if they have been certified as having mental retardation (as that term is used in Executive Order 12125 dated March 15, 1979), or severe physical or psychiatric disability. However, the certification process is onerous and complicated, involving review by State and/or Federal agencies even where the disability has been clearly diagnosed by a licensed medical authority. After careful consideration of that certification requirement, we propose changing the current regulations to simplify the disability determination process in certain cases, consolidate the three existing Schedule A appointing authorities for persons with mental retardation, severe physical, or psychiatric disabilities, and thereby streamline the Federal hiring process for these deserving individuals.

OPM currently provides agencies three separate appointing authorities for individuals with mental retardation, severe physical, and psychiatric disabilities. The provisions for each authority were authorized under Executive Order (E.O.) 12125, as amended by E.O. 13124, and vary only slightly from one another. The proposed rules standardize and consolidate these provisions into one streamlined appointing authority.

In addition, the current regulations specify that, for purposes of these appointments, the certification that a person with a severe physical disability or a person with a psychiatric disability is disabled and likely to successfully perform duties of the job for which he or she is applying (including Federal jobs) may be provided only by the Department of Veterans Affairs (VA) or an applicable State Vocational Rehabilitation Agency (SVRA). Similarly, only SVRAs may provide the required certification for a person with mental retardation. Thus, an individual with a disability determination from a Federal agency other than the VA may not use that documentation for purposes of obtaining eligibility for a Schedule A excepted appointment for a Federal job. The proposed rulemaking seeks to remedy this situation by delegating this certification authority to other Federal agencies under certain conditions.

OPM believes the proposed regulations will facilitate the Federal Government's ability to hire persons with disabilities, in furtherance of the President's New Freedom Initiative, introduced in February 2001, which was designed to increase employment opportunities for persons with disabilities. We seek comments on the proposed changes from all interested parties, but especially from agencies on their ability to determine the eligibility of applicants with disabilities for appointment under Schedule A and evaluating these applicants' likelihood of success in a specific job without certification from a state or Veterans Administration vocational rehabilitation counselor.

Proposed Amendments

Under these proposed regulations, one consolidated authority would replace the following:

Schedule A authority § 213.3102(t) for positions when filled by people with mental retardation; Schedule A authority § 213.3102(u) for positions when filled by people with severe physical disabilities; and

Schedule A authority § 213.3102(gg) for positions when filled by people with psychiatric disabilities.

Using the new program, agencies will appoint individuals under § 213.3102(u). The new Schedule A authority contains updated certification procedures, a temporary employment option, and requirements for non-competitive conversion to the competitive service.

Certification Procedures

This proposed rule will allow Federal agencies to certify, then immediately hire, disabled applicants who are likely to succeed as Federal employees.

The proposed certification procedures authorize any Federal agency to certify, on a case-by-case basis, that a particular applicant has provided sufficient evidence of mental retardation, severe physical, or psychiatric disability; such evidence may be certification from the Social Security Administration (SSA) or a licensed physician. In addition, the proposed procedures authorize the agency to determine whether a disabled applicant is likely to successfully perform the job for which he or she is applying. By authorizing agencies to make such certifications on a case-by-case basis, the proposed regulations will eliminate an unnecessary burden on disabled job applicants as well as potentially duplicative certification procedures. Agencies will retain the option of requiring VA or SVRA certification of a disabled applicant where the agencies are unable to make a determination based on documentation submitted by the applicant.

To determine whether to certify an individual, Federal agencies would be required to review medical documentation presented by the job applicant, such as a physician's statement or disability documentation from the SSA and/or an appropriate State Disability Determination Services agency (if the severe physical disability is not obvious), and all other relevant evidence needed to determine if the applicant is likely to succeed in the job (*e.g.*, degrees from accredited colleges, work experience, tests, etc.).

Temporary Employment Option

The proposed regulations will retain a temporary employment option as an alternative to the certification procedures described above. Under this option, agencies may offer a Schedule A excepted appointment, without further certification, to people with disabilities who have already demonstrated their ability to perform duties satisfactorily under a temporary appointment.

Requirements for Non-Competitive Conversion

For a person with mental retardation, severe physical, or psychiatric disability, the proposed regulations also provide agencies the discretionary authority to convert such a person non-competitively to the competitive service, upon 2 years of satisfactory service in a Schedule A excepted appointment made under the proposed regulations.

Appointments

The proposed rule contains only one authority, 5 CFR 213.3102(u), for appointments of persons with disabilities. When these regulations become effective, agencies will convert the appointments of individuals currently serving on appointments under the superseded authorities to 5 CFR 213.3102(u). OPM's Central Personnel Data File will continue to retain the legal authority code required by the Guide to Processing Personnel Actions for analysis by disability type.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain potential applicants and Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Parts 213 and 315

Government employees, Reporting and recordkeeping requirements.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, OPM proposes to amend 5 CFR parts 213 and 315 as follows:

PART 213—EXCEPTED SERVICE

1. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218.

Sec. 213.101 also issued under 5 U.S.C. 2103.

Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 47 FR 22931, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 *et seq.*; Pub. L. 105–339, 112 Stat 3182–83; and E.O. 13162.

2. Amend § 213.3102 by removing and reserving paragraphs (t) and (gg), and by revising paragraph (u) to read as follows:

§ 213.3102 Entire executive civil service.

* * * * *

(u) *Appointment for Persons With Disabilities.* (1) *Purpose.* An agency may appoint a person with mental retardation, a person with a severe physical disability, or a person with a psychiatric disability who, on the basis of authoritative medical and other appropriate documentation submitted by or on his or her behalf, has been certified by the appointing agency, another Federal agency, or a State Vocational Rehabilitation Agency (SVRA), as having from one or more of those conditions; and who has:

(i) Demonstrated his or her ability to perform satisfactorily the duties of the position for which he or she is applying by serving previously on a temporary appointment; or

(ii) Been certified by the appointing agency, another Federal agency, or a State Vocational Rehabilitation Agency (SVRA) as likely to succeed in the performance of the duties of the position for which he or she is applying.

(2) *Non-competitive conversion.* An agency may non-competitively convert to the competitive service an employee who has completed 2 years of satisfactory service under this authority in accordance with the provisions of Executive Order 12125 as amended by Executive Order 13124 and § 315.709 of this chapter.

* * * * *

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

3. The authority citation for part 315 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, and 3302; E.O. 10577. 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted; and E.O. 13162. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p. 111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(d). Sec. 315.611 also issued under Section 511, Pub. L. 106–117, 113 Stat. 1575–76. Sec. 315.708 also issued under E.O. 13318. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987, Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

Subpart B—The Career-Conditional Employment System

4. In § 315.201 revise paragraph (b)(1)(xii) to read as follows:

§ 315.201 Service requirement for career tenure.

* * * * *

(b) * * *

(1) * * *

(xii) The date of nontemporary appointment under Schedule A, § 213.3102(u) of this chapter, of a person with mental retardation, a severe physical disability, or a psychiatric disability, provided the employee's appointment is converted to a career or career-conditional appointment under § 315.709;

* * * * *

Subpart G—Conversion to Career or Career-Conditional Employment From Other Types of Employment

5. Revise § 315.709 to read as follows:

§ 315.709 Appointment for Persons With Disabilities.

(a) *Coverage.* An employee appointed under § 213.3102(u) of this chapter may have his or her appointment converted to a career or career-conditional appointment when he or she:

(1) Completes 2 or more years of satisfactory service, without a break of more than 30 days, under a nontemporary Schedule A appointment;

(2) Is recommended for such conversion by his or her supervisors;

(3) Meets all requirements and conditions governing career and career-conditional appointment except those requirements concerning competitive selection from a register and medical qualifications; and

(4) Is converted without a break in service of one workday.

(b) *Tenure on conversion.* An employee converted under paragraph (a) of this section becomes:

(1) A career-conditional employee, except as provided in paragraph (b)(2) of this section;

(2) A career employee if he or she has completed 3 years of substantially continuous service in a nontemporary appointment under § 213.3102(u) of this chapter, or has otherwise completed the service requirement for career tenure, or is excepted from it by § 315.201(c).

(c) *Acquisition of competitive status.* A person whose employment is converted to career or career-conditional employment under this section acquires a competitive status automatically on conversion.

[FR Doc. 05–456 Filed 1–10–05; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 97

[Docket Number ST02–02]

RIN # 0581–AC31

Plant Variety Protection Office, Supplemental Fees

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule with request for comments.

SUMMARY: The Agricultural Marketing Service (AMS) proposes supplemental fees for the Plant Variety Protection (PVP) Office covering a variety of administrative services that are not currently charged by the program. These include administrative service requests for: replenishment of seed low in germination or seed number; submission of new application data after notice of allowance, but prior to certificate issuance; recording any revision, withdrawal, or revocation of an assignment; and protest to the issuance of a certificate. The allowance and issuance fee will be increased also to recover the costs of enhancing the PVP program's electronic archiving capabilities. Also, technical amendments are proposed which would revise or remove obsolete language.

DATES: Comments must be received on or before February 10, 2005.

ADDRESSES: Interested persons are invited to submit comments concerning this proposed rule. Comments should be sent in triplicate to Dr. Paul M. Zankowski, Commissioner, PVP Office, Room 401, NAL Building, 10301 Baltimore Avenue, Beltsville, MD 20705–2351, telephone (301) 504–5518, fax (301) 504–5291, and should refer to the docket title and number located in the heading of this document. Comments received will be available for public inspection at the same location, between the hours of 10 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Janice M. Strachan, USDA, AMS, Science and Technology (S&T), PVP Office, 10301 Baltimore Avenue, NAL Room 401, Beltsville, MD 20705–2351, telephone (301) 504–5518, and fax (301) 504–5291.

SUPPLEMENTARY INFORMATION:

I. Executive Order 12866

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget (OMB).

II. Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the AMS has considered the economic impact of this action on small business entities. There are more than 800 potential users of the Plant Variety Protection (PVP) Office's service, of whom about 100 may file applications in a given year. Some of these users are considered small business entities under the criteria established by the Small Business Administration (13 CFR 121.201). The AMS has determined that this action would not have a significant economic impact on a substantial number of these small business entities.

The PVP Office administers the PVP Act of 1970, as amended (7 U.S.C. 2321 *et seq.*), and issues Certificates of Protection that provide intellectual property rights to developers of new varieties of plants. A Certificate of Protection is awarded to an owner of a variety after examination indicates that the variety is new, distinct from other varieties, genetically uniform, and stable through successive generations. The Act requires that reasonable fees be collected in order to maintain the program. This action will add new fees charged to users of plant variety protection for administrative services. AMS estimates that the proposed rule will yield an additional $96,000 of new revenue in fiscal year (FY) 2006. The costs to private and public business entities will be proportional to their use of the administrative services. The PVP program is a voluntary service, so any decision by developers to discontinue the use of plant variety protection will not hinder private and public entities from marketing their varieties in commercial markets.

AMS regularly reviews its user-fee-financed programs to determine their fiscal condition. In a recent review of the PVP program, the cost analysis indicated that there are a number of administrative services for which there are no fees available to recover costs. AMS determined the new fees by analyzing the costs for providing the listed services, including salaries and materials.

The PVP Advisory Board has been informed of customer services for which the PVP Office is not reimbursed, and consulted on new supplementary fees in November 2001 and again in March 2003. The Board recommended that new supplemental fees be put in place. This proposed rule will make changes in the regulations to implement the supplemental fees.

Without the supplemental fees in FY 2006, the PVP Office revenues are projected at $1,496,000, operational expenses are estimated at $1,614,720, and trust fund balances would be down to $966,458. On the other hand, if supplemental fees are established, the trust fund balance would be $1,243,658 at the end of FY 2006, which would begin to replenish the program reserves.

III. Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect, nor will it preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the proposed rule. There are no administrative procedures that must be exhausted prior to any judicial

challenge to the provisions of the proposed rule.

IV. Paperwork Reduction Act

This proposed rule does not contain any information collection or recordkeeping requirements that are subject to the Office of Management and Budget approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

The current information collection and recordkeeping requirements in part 97 have been previously approved under OMB control No. 0581–0055.

Background Information and Proposed Changes

The PVP program is a voluntary, user-fee-funded service, conducted under the Authority of the PVP Act (7 U.S.C. 2321 *et seq.*) of 1970, as amended. The Act authorizes the Secretary of Agriculture to provide intellectual property rights that facilitate marketing of new varieties of seed reproduced or tuber propagated plants. The Act also requires that reasonable fees be collected from the users of the services to cover the costs of maintaining the program.

This proposed rule would amend the current fee schedule to cover a variety of administrative services for which users are not being charged by the program. These include administrative service requests for replenishment of seed low in germination or seed number; submission of new application data after notice of allowance, but prior to certificate issuance; revocation of authorization or change of address on assignments, security interests, licenses, grants, or conveyances; recording of withdrawal from assignments, security interests, licenses, grants, or conveyances; and protest to the issuance of a certificate. In addition, the allowance and issuance fee will be increased by $250 to recover the costs of improving the PVP program's electronic archiving capabilities.

On January 10, 2003, AMS published a rule in the **Federal Register** (68 FR 1359) that increased Plant Variety Protection fees that became effective February 10, 2003. In that rule, the fees were revised to take into account that from 1995 through 2002, the PVP Office absorbed accumulated national and locality salary increases for Federal employees. The proposed fees in this rule would yield an estimated $96,000 of additional revenue.

The PVP Advisory Board has been informed of customer services for which the PVP Office is not reimbursed, and consulted on new supplementary fees in November 2001 and again in March 2003. The Board recommended that new supplemental fees be put in place. This proposed rule makes changes in the regulations to implement these new supplemental fees.

Section 97.6(d)(1) would be amended by adding a replenishment fee for restocking the voucher seed sample. Seeds need to be replenished when the germination rate falls below 85%. The germination rate is tested periodically and these tests use up the stored seed sample. The voucher seed sample is a supplement to the Exhibit C description of the variety and is kept for the life of the certificate. Failure to replenish the voucher seed sample results in cancellation of the certificate.

This proposed rule would amend § 97.2 by updating the definition of the term ''Plant Variety Protection Office'' by noting that the Office is part of the Agricultural Marketing Service's Science and Technology Programs. The definition of the term ''owner'' would also be clarified by specifying that the owner is the person who developed or discovered and developed a variety, or the breeder's successor, as the PVPA provides.

The address of the PVPO is given in § 97.5(c). This proposed rule would update the address of the office.

Section 97.6(d) provides that a viable seed sample shall be submitted with the application. For tuber propagated varieties, the applicant must verify that a viable cell culture has been deposited in an approved public depository, and for hybrids from self-incompatible parents, verification that a plot of vegetative material for each parent has been established in an approved public depository.

Because of the expense of depositing cell cultures and because cell cultures are not useful in the examination process, the PVPO has granted exceptions to applicants so that the cell culture need not be deposited until the examination has been completed. This proposed rule would regularize this practice by providing that applicants declare that the cell culture will be deposited. A similar change would be made for the establishment of plots of vegetative material for self-incompatible parents of hybrids.

There are instances where it is impractical or impossible for the applicant to submit a sample of viable seeds with the application. For example, requirements for phytosanitary certificates for the importation of seed could delay the submission of a sample until the variety would no longer be eligible for protection. Accordingly the proposed rule would allow a waiver of the requirement that the sample be submitted at the time of the application; this is not intended to operate so that the certificate could be obtained without submitting the seed sample.

Section 97.158 prohibits, with limited exceptions, advertising by attorneys and other persons practicing before the PVPO. Although the prohibition of advertising by attorneys was once standard, this is no longer the case. Accordingly, the provisions would be removed.

The provision for priority contests, §§ 97.205 through 97.222, are obsolete and should be removed, together with references to those provisions in other sections. When the same variety is independently developed by different parties, the right of priority for a certificate of protection is determined by filing date. Prior to the amendment of the PVPA in 1994, the right of priority was controlled by the date of determination of the variety. Because applications pending at the time of the amendment of the PVPA continued to be governed by the old provisions, it was necessary to leave the priority contest regulations in place for a transition period. There are no longer any pending applications to which the priority contest procedure could be applied. All other references to priority contests would also be removed.

Section 97.175 would be revised by adding new supplemental fees, and incorporating language to the present fee schedule to recover the costs of administrative service requests for: Replenishment of seed low in germination or seed number; submission of new application data after notice of allowance, but prior to certificate issuance; revocation of authorization, change of address, or recording of withdrawal from assignments, security interests, licenses, grants, or conveyances; and protest to the issuance of a certificate.

Finally, the authority citation for part 97 would be revised to remove a reference to an obsolete statutory provision.

A 30-day comment period is provided to allow interested persons the opportunity to respond to the proposal, including any regulatory and informational impact of this action on organizations considered small businesses. Thirty days is deemed appropriate because present fees do not properly cover program costs and additional revenues need to be generated to effectively operate the program.

List of Subjects in 7 CFR Part 97

Plants, seeds.

For reasons set forth in the preamble, it is proposed that 7 CFR part 97 be amended as follows.

PART 97—PLANT VARIETY PROTECTION

1. The authority citation for part 97 would be revised to read as follows:

Authority: Plant Variety Protection Act, as amended, 7 U.S.C. 2321 *et seq.*

§ 97.2 [Amended]

2. Section 97.2 is amended by:

(a) Revising the word ''Division'' to read ''Programs'' in the definition of the term *Office or Plant Variety Protection Office.*

(b) Adding the words ''and developed'' after the word ''discovered'' in the definition of term *Owner.*

3. In § 97.5, paragraph (c) is revised to read as follows:

§ 97.5 General Requirements.

* * * * *

(c) Application and exhibit forms shall be issued by the Commissioner. (Copies of the forms may be obtained from the Plant Variety Protection Office, National Agricultural Library, Room 401, 10301 Baltimore Avenue, Beltsville, MD 20705–2351).

* * * * *

§ 97.6 [Amended]

4. Section 97.6 is amended by:

(a) Adding the words '', unless a waiver has been granted for good cause' immediately following the word ''variety'' in paragraph (d)(1).

(b) Removing the words ''verification that a viable cell culture has been deposited'' and adding the words ''a declaration that a viable cell culture will be deposited'' in their place in paragraph (d)(2).

(c) Removing the words ''verification that a plot of vegetable material for each parent has been established'' and adding the words ''a declaration that a plot of vegetative material for each parent will be established'' in their place in paragraph (d)(3).

§ 97.104 [Amended]

5. In § 97.104, paragraph (b) the words ''and shall pay the handling fee for replenishment'' are added following the words ''sample of the variety''.

§ 97.107 [Amended]

6. § 97.107, the words ''within 60 days from the date of denial, in accordance with §§ 97.300—97.303'' are removed.

§ 97.108 [Amended]

7. In § 97.108, paragraph (b) the words ''to carry into effect a recommendation under § 97.302(b)'' are removed and the words ''in accordance with the decision'' are added in their place.

§ 97.158 [Removed]

8. Section 97.158 is removed.

§ 97.175 [Revised]

9. Section 97.175 is revised to read as follows:

(a) Filing the application and notifying the public of filing—$432.00.

(b) Search or examination—$3,220.00

(c) Submission of new application data, after notice of allowance, prior to issuance of certificate—$432.00.

(d) Allowance and issuance of certificate and notifying public of issuance—$682.00.

(e) Revived an abandoned application—$432.00

(f) Reproduction of records, drawings, certificates, exhibits, or printed material (copy per page of material)—$1.50.

(g) Authentication (each page)—$1.50.

(h) Correcting or re-issuance of a certificate—$432.00

(i) Recording an assignment, any revision of an assignment, or withdrawal or revocation of an assignment (per certificate or application)—$38.00.

(j) Copies of 8 × 10 photographs in color—$38.00.

(k) Additional fee for reconsideration—$432.00.

(l) Additional fee for late payment—$38.00.

(m) Fee for handling replenishment seed sample (applicable only for certificates issued after [insert the effective date of the final rule])—$38.00.

(n) Additional fee for late replenishment of seed—$38.00.

(o) Filing a petition for protest proceeding—$4,118.00.

(p) Appeal to Secretary (refundable if appeal overturns the Commissioner's decision)—$4,118.00.

(q) Granting of extensions for responding to a request—$74.00.

(r) Field inspection or other services requiring travel by a representative of the Plant Variety Protection Office, made at the request of the applicant, shall be reimbursable in full (including travel, per diem or subsistence, salary, and administrative costs) in accordance with Standardized Government Travel Regulation.

(s) Any other service not covered in this section will be charged for at rates prescribed by the Commissioner, but in no event shall they exceed $89.00 per employee-hour. Charges will also be made for materials, space, and administrative costs.

§§ 97.205–97.222 [Removed]

10. Sections 97.205 through 97.222 are removed.

Dated: January 5, 2005.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–472 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 925

[Docket No. FV05–925–1 PR]

Grapes Grown in a Designated Area of Southeastern California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate established for the California Desert Grape Administrative Committee (committee) for the 2005 and subsequent fiscal periods from $0.015 to $0.0175 per 18-pound lug of grapes handled. The committee locally administers the marketing order which regulates the handling of grapes grown in a designated area of southeastern California. Authorization to assess grape handlers enables the committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period begins January 1 and ends December 31. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by February 10, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; e-mail: *moab.docketclerk@usda.gov;* or Internet: *http://www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Toni Sasselli, Program Analyst or Terry Vawter, Marketing Specialist, Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California

93721; telephone: (559) 487–5901; Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491; Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491; Fax: (202) 720–8938; or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 925, both as amended (7 CFR part 925), regulating the handling of grapes grown in a designated area of southeastern California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California grape handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable grapes beginning on January 1, 2005, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would increase the assessment rate established for the committee for the 2005 and subsequent fiscal periods from $0.015 to $0.0175 per 18-pound lug of grapes.

The grape marketing order provides authority for the committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the committee are producers and handlers of California grapes. They are familiar with the committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2002 and subsequent fiscal periods, the committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other information available to USDA.

The committee met on November 9, 2004, and unanimously recommended expenditures of $210,691 and an assessment rate of $0.0175 per 18-pound lug of grapes for the 2005 fiscal period. In comparison, last year's budgeted expenditures were $188,091. The assessment rate of $0.0175 is $0.0025 higher than the rate currently in effect. The increased assessment rate together with interest income and reserve funds is needed to ensure that sufficient funds are available to offset an increase in salaries and research programs in 2005, and ensure that an adequate carryover of reserve funds is available for the 2006 fiscal year.

The expenditures recommended by the committee for the 2005 fiscal period include $125,000 for research, $5,000 for compliance activities, $45,500 for salaries and payroll expenses, and $32,191 for other expenses. Budgeted expenses for these items in 2004 were $100,000 for research, $10,000 for compliance activities, $43,500 for salaries, and $34,591 for other expenses.

The assessment rate recommended by the committee was derived using the following formula: Total shipments (8.5 million 18-pound lugs) times the recommended assessment rate ($0.0175 per 18-pound lug), plus anticipated interest income ($300) and the 2005 beginning reserve ($78,000), minus the anticipated expenses ($210,691), leave a 2005 ending reserve ($16,359).

Based on this calculation, the $0.0175 assessment rate, interest income, and reserve funds would provide sufficient income to meet the 2005 anticipated expenses of $210,691 and would fund an adequate December 2005 ending reserve of $16,359. The December 2005 ending reserve would be within the maximum permitted by the order. The maximum permitted is approximately one fiscal period's expenses (§ 925.41 of the order).

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the committee would continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of committee meetings are available from the committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The committee's 2005 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 50 producers of grapes in the production area and approximately 20 handlers subject to regulation under the marketing order.

Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than $750,000 and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

Last year, eight of the 20 handlers subject to regulation had annual grape sales of at least $5,000,000. In addition, 10 of the 50 producers had annual sales of at least $750,000. Therefore, a majority of handlers and producers may be classified as small entities.

This rule would increase the assessment rate established for the committee and collected from handlers for the 2005 and subsequent fiscal periods from $0.015 to $0.0175 per 18-pound lug of grapes. The committee unanimously recommended expenditures of $210,691 and an assessment rate of $0.0175 per 18-pound lug of grapes for the 2005 fiscal period. The proposed assessment rate of $0.0175 is $0.0025 higher than the 2005 rate. The number of assessable grapes is estimated at 8.5 million 18-pound lugs. Thus, the $0.0175 rate should provide $148,750 in assessment income. Income derived from handler assessments, along with interest income and funds from the committee's authorized carry-in reserves should be adequate to cover budgeted expenses in 2005.

The expenditures recommended by the committee for the 2005 fiscal period include $125,000 for research, $5,000 for compliance activities, $45,500 for salaries and payroll expenses, and $32,191 for other expenses. Budgeted expenses for these items in 2004 were $100,000 for research, $10,000 for compliance activities, $43,500 for salaries, and $34,591 for other expenses.

The committee reviewed and unanimously recommended 2005 expenditures of $210,691 which included increases in salaries and research programs. Prior to arriving at this budget, the committee considered alternative expenditure and assessment rate levels, but ultimately decided that the recommended levels were reasonable to properly administer the order.

The assessment rate recommended by the committee was derived by the following formula: Total shipments (8.5 million 18-pound lugs) times the recommended assessment rate ($0.0175 per 18-pound lug), plus the anticipated interest income ($300) and the 2005 beginning reserve ($78,000), minus the anticipated expenses ($210,691), results in a 2005 ending reserve ($16,359).

This rate would provide sufficient funds in combination with interest and reserve funds to meet the anticipated expenses of $210,691 and result in a December 2005 ending reserve of $16,359, which is acceptable to the committee. The December 2005 ending reserve would be within the maximum permitted by the order. As required under § 925.41 of the order, the ending reserve must be kept within approximately one fiscal period's expenses.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the on-vine grower price for the 2005 season could range between $5.00 and $9.00 per 18-pound lug of grapes. Therefore, the estimated assessment revenue for the 2005 fiscal period as a percentage of total grower revenue could range between 0.2 and 0.4 percent.

This action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order.

In addition, the committee's meeting was widely publicized throughout the grape production area and all interested persons were invited to attend the meeting and participate in committee deliberations on all issues. Like all committee meetings, the November 9, 2004, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large production area grape handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. Thirty days is deemed appropriate because: (1) The 2005 fiscal period begins on January 1, 2005, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable grapes handled during such fiscal period; (2) the committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; and (3) handlers are aware of this action which was unanimously recommended by the committee at a public meeting and is similar to other assessment rate actions issued in past years.

List of Subjects in 7 CFR Part 925

Grapes, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 925 is proposed to be amended as follows:

PART 925—GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA

1. The authority citation for 7 CFR part 925 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 925.215 is revised to read as follows:

§ 925.215 Assessment rate.

On and after January 1, 2005, an assessment rate of $0.0175 per 18-pound lug is established for grapes grown in a designated area of southeastern California.

Dated: January 5, 2005.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 05–470 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 982

[Docket No. FV05–982–2]

Hazelnuts Grown in Oregon and Washington; Continuance Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible growers of hazelnuts in Oregon and Washington, to determine whether they favor continuance of the marketing order regulating the handling of hazelnuts grown in the production area.

DATES: The referendum will be conducted from February 7 through February 25, 2005. To vote in this referendum, growers must have been producing hazelnuts within the designated production area in Oregon and Washington, during the period July 1, 2003, through June 30, 2004.

ADDRESSES: Copies of the marketing order may be obtained from the office of the referendum agents at 1220 SW. Third Avenue, suite 385, Portland, Oregon 97204–2807, or the Office of the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237.

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, suite 385; telephone (503) 326–2724; fax (503) 326–7440; or Kathy Finn, Acting Rulemaking Team Leader, Marketing Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; telephone (202) 720–2491; fax (202) 720–8938.

SUPPLEMENTARY INFORMATION: Pursuant to Marketing Order No. 982 (7 CFR part 982), hereinafter referred to as the ''order,'' and the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act,'' it is hereby directed that a referendum be conducted to ascertain whether continuance of the order is favored by the growers. The referendum shall be conducted during the period February 7 through February 25, 2005, among hazelnut growers in the production area. Only growers that were engaged in the production of hazelnuts in Oregon and Washington during the period of July 1, 2003, through June 30, 2004, may participate in the continuance referendum.

USDA has determined that continuance referenda are an effective means for determining whether growers favor continuation of marketing order programs. The Department would consider termination of the order if less than two-thirds of the growers voting in the referendum and growers of less than two-thirds of the volume of hazelnuts represented in the referendum favor continuance. In evaluating the merits of continuance versus termination, the USDA will not only consider the results of the continuance referendum. The USDA will also consider all other relevant information concerning the operation of the order and the relative benefits and disadvantages to growers, handlers, and consumers in order to determine whether continued operation of the order would tend to effectuate the declared policy of the Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the ballot materials to be used in the referendum herein ordered have been submitted to and approved by the Office of Management and Budget (OMB) and have been assigned OMB No. 0581–0178. It has been estimated that it will take an average of 20 minutes for each of the approximately 750 growers of hazelnuts grown in Oregon and Washington, to cast a ballot. Participation is voluntary. Ballots postmarked after February 25, 2005, will not be included in the vote tabulation.

Gary D. Olson and Barry Broadbent of the Northwest Marketing Field Office, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, are hereby designated as the referendum agents of the Department to conduct such referendum. The procedure applicable to the referendum shall be the ''Procedure for the Conduct of Referenda in Connection With Marketing Orders for Fruits, Vegetables, and Nuts Pursuant to the Agricultural Marketing Agreement Act of 1937, as Amended'' (7 CFR 900.400 *et seq*).

Ballots will be mailed to all growers of record and may also be obtained from the referendum agents, or from their appointees.

List of Subjects in 7 CFR Part 982

Hazelnuts, Marketing agreements, Reporting and recordkeeping requirements.

Authority: 7 U.S.C. 601–674.

Dated: January 5, 2005.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 05–471 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–02–P

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 542

RIN 3141–AA27

Minimum Internal Control Standards

AGENCY: National Indian Gaming Commission.

ACTION: Proposed rule revisions; extension of comment period.

SUMMARY: On December 1, 2004, the National Indian Gaming Commission (Commission) issued Proposed rule revisions (69 FR 69847, December 1, 2004) (November 27, 2000) containing corrections and revisions to the Commission's existing regulations establishing minimum internal control standards (MICS) for gaming operations on Indian land and requesting comments prior to publication of a final rule. The date for filing comments is being extended.

DATES: Comments must be received by February 18, 2005.

ADDRESSES: Mail comments to ''Comments to First Proposed MICS Rule Revisions, National Indian Gaming Commission, 1441 L Street, NW., Washington, DC 20005, Attn: Vice-Chairman Nelson Westrin. Comments may be submitted by facsimile to Vice-Chairman Westrin at (202) 632–0045, but the original also must be submitted to the above address.

FOR FURTHER INFORMATION CONTACT: Vice-Chairman Nelson Westrin, (202) 632–7003 (not a toll-free number).

SUPPLEMENTARY INFORMATION: In response to the inherent risks of gaming enterprises and the resulting need for effective internal controls in Tribal gaming operations, the National Indian Gaming Commission (Commission or NIGC) first developed Minimum Internal Control Standards (MICS) for Indian gaming in 1999, and revised them in 2002. The Commission recognized from the outset that periodic technical adjustments and revisions would be necessary to keep the MICS effective in protecting Tribal gaming assets and the interests of Tribal stakeholders and the gaming public. To that end, the following proposed rule revisions contain certain proposed corrections and revisions to the Commission's existing MICS, which are necessary to correct erroneous citations or references in the MICS and to clarify, improve, and update other existing MICS provisions. The purpose of these proposed MICS revisions is to address apparent shortcomings in the MICS and various changes in Tribal gaming technology and methods. Public comment to these proposed MICS revisions will be received by the Commission until February 18, 2005. After consideration of all received comments, the Commission will make whatever changes to the proposed revisions that it deems appropriate and then promulgate and publish the final

revisions to the Commission's MICS Rule, 25 CFR Part 542.

Signed in Washington, DC, this 5th day of January, 2005.

Philip N. Hogen,

Chairman.

Nelson Westrin,

Vice-Chairman.

Cloyce Choney,

Commissioner.

[FR Doc. 05–448 Filed 1–10–05; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AM03

Eligibility for Health Care Benefits for Certain Filipino Veterans in the United States

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: Department of Veterans Affairs (VA) medical regulations describe veterans who are eligible to receive health care from VA in the United States. We are proposing to amend these regulations to include any Filipino Commonwealth Army veteran who was recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces or new Philippine Scouts, if such veteran or scout resides in the U.S., and is a citizen or lawfully admitted to the United States for permanent residence. Under this proposal these certain veterans would be eligible for VA hospital care, nursing home care, and outpatient medical services in the United States in the same manner and subject to the same terms and conditions as apply to U.S. veterans. This proposal would allow those veterans to receive health care from VA.

DATES: Comments must be received on or before March 14, 2005.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or fax to (202) 273–9026; e-mail to *VARegulations@mail.va.gov;* or, through *http://www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AM03.'' All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Tony Guagliardo, Deputy Director of Business Policy, Chief Business Office (163), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 254–0406. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On December 6, 2003, Public Law 108–170, the Veterans Health Care, Capital Asset, and Business Improvement Act of 2003, was enacted authorizing VA to provide hospital care, nursing home care, and outpatient medical services to certain Filipino veterans in the same manner and subject to the same terms and conditions as apply to U.S. veterans. Verification of service is usually demonstrated through issuance of an official ''Certification of Military Service'' or other acceptable documents demonstrating service under commanders appointed, designated, or subsequently recognized by the Commander-in-Chief, Southwest Pacific Area, other competent authority in the Army of the United States or service department and who were discharged or released from service under conditions other than dishonorable (*see* 38 CFR 3.1(y), 3.40 and 3.203).

These ''certain Filipino veterans'' are Commonwealth Army veterans, including those who were recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, and new Philippine Scouts. These veterans must reside in the U.S., and be a citizen, or lawfully admitted to the United States for permanent residence.

Commonwealth Army Veterans, including those who were recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, and new Philippine Scouts are not currently eligible for VA care in the United States if they do not meet the residency and citizenship requirements. This rule proposes to amend VA medical regulation 38 CFR 17.39 to include Filipino Commonwealth Army veterans, including those who were recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, and new Philippine Scouts who reside in the U.S. and who are citizens, or lawfully admitted to the United States for permanent residence as persons who are eligible for VA health care benefits within the United States on the same basis as U.S. veterans. This proposed rule also establishes requirements for proof of citizenship or lawful permanent residency status that veterans must provide in order to be eligible for VA health care benefits.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or the private sector.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), a collection of information is set forth in proposed 38 CFR 17.39. Accordingly, under section 3507(d) of the Act, VA has submitted a copy of this rulemaking action to the Office of Management and Budget (OMB) for its review of the proposed collection of information.

OMB assigns a control number for each collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Comments on the proposed collections of information should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies mailed or hand-delivered to: Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420. Comments should indicate that they are submitted in response to ''RIN 2900–AM03.''

Title: Eligibility for Health Care Benefits for Certain Filipino Veterans.

Summary of Collection of Information: Under proposed § 17.39, Filipino veterans who reside in the U.S., and who are citizens, or lawfully admitted for permanent residence can be enrolled into the VA healthcare system and receive medical care from VA. VA is revising the currently approved collection of information entitled ''Application and Renewal for Health Benefits'', OMB number 2900–0091 to include Filipino veterans eligible under this rule.

Description of the need for information and proposed use of information: The information is needed to establish eligibility and priority group

and for purposes of enrollment into the VA healthcare system.

Description of likely respondents: Veterans who are eligible to receive health care from VA including Filipino veterans eligible under this rule.

Estimated number of respondents: 1,900,000 revised to 1,904,940.

Estimated frequency of responses: 1.

Estimated annual burden per collection: 45 minutes for the 10–10EZ, 20 minutes for the 10–10EZR.

Estimated total annual reporting and record keeping burden: 1,005,000 current revised to 1,008,180 hours.

The Department considers comments by the public on proposed collections of information in—

• Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;

• Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

• Enhancing the quality, usefulness, and clarity of the information to be collected; and

• Minimizing the burden of the collections of information on those who are to respond, including responses through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. This proposed amendment would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers for the programs affected by this document are 64.005, 64.007, 64.008, 64.009, 64.010, 64.011, 64.012, 64.013, 64.014, 64.015, 64.016, 64.018, 64.019, 64.022, and 64.025.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: October 7, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, we propose to amend 38 CFR part 17, as set forth below:

PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, 1721, unless otherwise noted.

2. Revise § 17.39 to read as follows:

§ 17.39 Certain Filipino veterans.

(a) Any Filipino Commonwealth Army veteran, including one who was recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, or any new Philippine Scout is eligible for hospital care, nursing home care, and outpatient medical services within the United States in the same manner and subject to the same terms and conditions as apply to U.S. veterans, if such veteran or scout resides in the United States and is a citizen or lawfully admitted to the United States for permanent residence. For purposes of these VA health care benefits, the standards described in 38 CFR 3.42(c) will be accepted as proof of U.S. citizenship or lawful permanent residence.

(b) Commonwealth Army Veterans, including those who were recognized by authority of the U.S. Army as belonging to organized Filipino guerilla forces, and new Philippine Scouts are not eligible for VA health care benefits if they do not meet the residency and citizenship requirements described in § 3.42(c).

[FR Doc. 05–493 Filed 1–10–05; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7857–7]

New York: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: New York has applied to EPA for Final authorization of changes to its hazardous waste program under Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant final authorization to New York for these changes which are described in the ''Rules and Regulations'' section of this **Federal Register**. In that section, EPA is authorizing the changes by an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we get written comments which oppose this authorization during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we get comments that oppose this action, we will either withdraw the immediate final rule, or the portion of the immediate final rule that is the subject of the comments. Only the remaining portion of the rule will take effect. We will then respond to those public comments opposing this authorization in a second final authorization notice. This second final notice may or may not include changes based on comments received during the public notice comment period. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send your written comments by February 10, 2005.

ADDRESSES: Submit your comments, identified by FRL–7857–7 by one of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

• E-mail: *infurna.michael@epamail.epa.gov.*

• Fax: (212) 637–4437.

• Mail: Send written comments to Michael Infurna, Division of

Environmental Planning and Protection, EPA, Region 2, 290 Broadway, 22nd Floor, New York, NY 10007.

• Hand Delivery or Courier: Deliver your comments to Michael Infurna, Division of Environmental Planning and Protection, EPA, Region 2, 290 Broadway, 22nd Floor, New York, NY 10007. Such deliveries are only accepted during the Regional Office's normal hours of operation. The public is advised to call in advance to verify the business hours. Special arrangements should be made for deliveries of boxed information.

You can view and copy New York's application during business hours at the following addresses: EPA Region 2 Library, 290 Broadway, 16th Floor, New York, NY 10007, Phone number: (212) 637–3185; or New York State Department of Environmental Conservation, Division of Solid and Hazardous Materials, 625 Broadway, Albany, NY 12233–7250, Phone number: (518) 402–8730. The public is advised to call in advance to verify the business hours of the above locations.

Instructions: Direct your comments to FRL–7857–7. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or e-mail. The Federal regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Michael Infurna, Division of Environmental Planning and Protection, EPA Region 2, 290 Broadway, 22nd floor, New York, NY 10007; telephone number (212) 637–4177; fax number: (212) 637–4377; e-mail address: *infurna.michael@epamail.epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Dated: Novemer 23, 2004.

Kathleen C. Callahan,

Acting Regional Administrator, Region 2.

[FR Doc. 05–503 Filed 1–10–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

42 CFR Part 9

RIN 0925–AA31

Standards of Care for Chimpanzees Held in the Federally Supported Chimpanzee Sanctuary System

AGENCY: National Institutes of Health, Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Institutes of Health (NIH) proposes to issue standards to implement provisions of the Chimpanzee Health Improvement, Maintenance, and Protection Act (CHIMP Act) authorizing the Secretary of the Department of Health and Human Services (DHHS) to develop and publish standards of care for chimpanzees held in the Sanctuary system supported by Federal funds authorized under the CHIMP Act. These regulations will apply to only those facilities receiving Federal funds as a part of the federally funded chimpanzee Sanctuary system.

DATES: Comments must be received on or before March 14, 2005 in order to assure that NIH will be able to consider comments in preparing the final rule.

ADDRESSES: You may submit comments, identified by RIN number 0925–AA31, by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

• E-mail: *jm40z@nih.gov*. Indicate RIN number 0925–AA31 in the subject line of the message.

• Fax: 301–402–0169.

• Mail: Jerry Moore, NIH Regulations Officer, Office of Management Assessment, National Institutes of Health, 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, Maryland 20892.

• Hand Delivery/Courier: 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, Maryland 20892.

FOR FURTHER INFORMATION CONTACT: Jerry Moore at the address given in the **ADDRESSES** section, or telephone 301–496–4607 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On December 20, 2000, the United States Congress enacted the Chimpanzee Health Improvement, Maintenance, and Protection Act of 2000 (Pub. L. 106–551). Section 1 of this law amended the Public Health Service (PHS) Act by adding a new section 481C (42 U.S.C. 287a–3a). Section 481C authorizes the Secretary to provide for the establishment and operation of a sanctuary system to provide for the lifetime care of chimpanzees that have been used, or were bred or purchased for use, in research conducted or supported by the National Institutes of Health (NIH), the Food and Drug Administration (FDA), Center for Disease Control and Prevention, or other agencies of the Federal Government, and with respect to which it has been determined by the Secretary that the chimpanzees are not needed for such research (*i.e.*, surplus chimpanzees). Section 481C (d) directs the Secretary to establish by regulation standards of care for operating the Sanctuary system to provide for the permanent retirement of surplus chimpanzees. These standards of care for chimpanzees must ensure the well-being of animals and the health and safety of the animals and the people caring for them. On April 5, 2001, the Secretary delegated to the Director, NIH, the authorities to establish and operate the sanctuary system. Subsequently, the Director, NIH, delegated the authorities to the National Center for Research Resources (NCRR). Consequently, NCRR has the lead responsibility for coordinating all efforts on behalf of the Department of Health and Human Services (DHHS) concerning the Sanctuary system for surplus chimpanzees from both Federal and non-Federal sources. Section 481C (e) authorizes the Secretary to make an award of a contract to a nonprofit private entity (*i.e.*, Sanctuary Contractor) under which the entity has the responsibility of operating (and establishing, as applicable) the Sanctuary system and awarding subcontracts to individual Sanctuary facilities that meet established standards. NCRR/NIH must approve both contractor and subcontractor awards and NCRR/NIH will verify

contractor and subcontractor (if applicable) qualifications through facility site visits, review of written documentation submitted to the contractor, and evaluating available and current resources.

NCRR/NIH will assure compliance with the Standards of Care Regulations through on site visits (at least quarterly or more often if necessary), review of quarterly and annual reports, and any other measures deemed appropriate by the NCRR/NIH Project or Contracts Officer. Noncompliance with these standards or any other federal or state regulations will result in the NCRR/NIH invoking the provisions of the contract that allows the government to terminate the contract and/or provide a management team to bring the Sanctuary back into compliance. The Sanctuary is covered by the Animal Welfare Regulations only if covered activities are performed. The CHIMP Act requires compliance with the Animal Welfare Act and the Federal Contract and these regulations require the Sanctuary Contractor to register with the USDA and agree to compliance inspections. Therefore, the USDA Inspectors responsible for enforcing the Animal Welfare Regulations will perform inspections for compliance with the Animal Welfare Regulations at a frequency and time determined by the USDA staff. Once the contractor becomes a Registered Facility the USDA will report noncompliance to NCRR/NIH as appropriate. The NCRR/NIH representative will review USDA inspection reports during on-site visits in order to monitor compliance with these proposed Standards of Care Regulations. The Sanctuary must also adhere to U.S. Public Health Service Policy on the Humane Care and Use of Laboratory Animals. If and when any noninvasive studies allowed under the CHIMP Act and these regulations are proposed for chimpanzees in the Sanctuary, the Sanctuary Contractor must obtain an Animal Welfare Assurance from the NIH Office of Laboratory Animal Welfare (OLAW) and comply with the provisions of the policy. Finally, the Sanctuary must obtain accreditation or certification by a nationally or internationally recognized body that performs such services. The Sanctuary must achieve accreditation or certification within a reasonable period of time as determined by the NCRR/NIH.

In preparing these proposed standards of care, we considered the recommendations of the Board of Directors of the Sanctuary contractor and the NCRR Chimpanzee Sanctuary Working Group, and the applicable recommendations of the National Research Council made in its 1997 report entitled, ''Chimpanzees in Research—Strategies for Their Ethical Care, Management, and Use.'' Individuals involved in developing recommendations from these groups represented a variety of professional areas including veterinary medicine, chimpanzee behavior, animal protection, facility management, and nonhuman primate research and care. We also consulted other publications, including: ''The Guide for the Care and Use of Laboratory Animals,'' published by the National Research Council (NRC), ''The Psychological Well-Being of Nonhuman Primates,'' also an NRC publication, ''Public Health Service Policy on Humane Care and Use of Laboratory Animals,'' the accreditation guidelines used by the Association for the Assessment and Accreditation of Laboratory Animal Care, International, and the American Zoological and Aquarium Association, and the United States Department of Agriculture (USDA), Animal Welfare Regulations codified in various parts of title 9, chapter 1, Subchapter A of the Code of Federal Regulations (CFR).

We propose to amend title 42 of the CFR by adding a new part 9 to establish standards for operating the Sanctuary system to provide for the permanent retirement of surplus chimpanzees. These standards of care will apply to only the sanctuaries that are a part of the federally funded chimpanzee Sanctuary system. The proposed rule specifies the scope and specific standards that must be met by all contractors (primary or subcontractors) operating under the federally supported Chimpanzee Sanctuary system. The purpose of this notice is to invite public comment on the proposed standards of care.

The following is provided as public information.

Executive Order 12866

Executive Order 12866, ''Regulatory Planning and Review,'' requires that all regulatory actions reflect consideration of the costs and benefits they generate, and that they meet certain standards, such as avoiding the imposition of unnecessary burdens on the affected public. Executive Order 12866 classifies a rule as a significant regulatory action if it meets any one of a number of specific conditions. We determined that this proposed rule is a ''significant regulatory action,'' as defined under Executive Order 12866, because it raises novel legal or policy issues. Therefore, we submitted the proposed rule to the Office of Information and Regulatory Affairs for review prior to publication in accordance with the requirements of Executive Order 12866.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. chapter 6) requires that we analyze regulatory proposals to determine whether they create a significant impact on a substantial number of small entities. Based on the analysis that follows, the Secretary certifies that this proposed rule will not have such impact when the final rule is issued.

1. Number and Type of Small Entities Affected

There are several small entities that privately fund nonhuman primate sanctuaries. However, the federally supported, contractor operated Chimpanzee Sanctuary System, established by the CHIMP Act and covered under the proposed standards of care, is the only one of its kind in existence. Congress established the Sanctuary to provide lifetime care for chimpanzees that are no longer needed in federally supported research. The proposed rule applies only to a contractor or any subcontractor operating under a contract funded by the NIH/NCRR for the Sanctuary. Only one contractor is identified in the proposed rule as the prime contractor for the Sanctuary system. The NCRR awarded this contract in September 2002. Additionally, a few subcontractors might be added in future years if the need arises. The subcontractors would be selected by the prime contractor (contingent upon NIH/NCRR approval), and report to the prime contractor. Approximately four or five biomedical research centers with chimpanzees will be responsible for the transport of animals to the Sanctuary. The entities shipping chimpanzees to the Sanctuary are required to comply with existing Animal Welfare Regulations administered by the USDA.

2. Net Cost of Compliance With the Proposed Rule

At the time NIH/NCRR awarded the contract in 2002, the contractor was aware of its role in establishing and complying with the proposed standards of care pursuant to the CHIMP Act. The costs necessary to comply with the standards of care were anticipated by the CHIMP Act and subsequent contract negotiations. The RFP and Statement of Work noted that Standards of Care would be developed in consultation with the selected contractor and that the contractor must comply with these standards. The contractor selected had

several members of their Board of Directors familiar with chimpanzee care standards and had served as consultants to some of the agencies publishing such standards. Therefore, they included resources needed to potentially comply with anticipated standards in their contract and construction grant proposals. There could be some additional unanticipated costs but they are not obvious at this time. Under the terms of the contract, the Federal Government assumes responsibility for seventy-five percent of the operational cost that includes compliance with the proposed standards of care. The net costs to the contractor are twenty-five percent of the total costs of care and maintenance of the chimpanzees, including compliance with the proposed standards of care. We estimate that this will amount to $875,000 to $1 million per year for the contractor. We anticipate no net increase in the costs as a result of compliance with the standards of care. We estimate that five or six research facilities might incur expenses in transporting animals to the Sanctuary, and thus will incur minor shipping costs (approximately $10,000 to $20,000 for 1 shipment for a total of six shipments/year.) Subcontractors will likely have existing facilities and staff though some might need to be upgraded. They would be eligible to compete for NIH Construction Grants the same as the prime contractor and thus match 10% of the construction cost. The use of subcontractors is not anticipated in the foreseeable future because of the availability of a considerable amount of unused space at the primary contractor. When the need arises for subcontractors in the operation of the Sanctuary, they will be selected by, and report to the prime contractor, with verification of qualifications by NCRR/NIH.

3. The Percentage Cost of Compliance With the Proposed Rule

We estimate that the percentage cost for complying with the proposed rule is less than three percent of the total operational cost of the Sanctuary. We anticipate that no additional staff is needed to comply with the proposed standards of care. The staffing under the terms of the contract is based upon the requirement to provide quality care and maintenance for the chimpanzees as required by the CHIMP Act and the contract.

Executive Order 13132

Executive Order 13132, ''Federalism,'' requires that Federal agencies consult with State and local government officials in the development of regulatory policies with federalism implications. The Secretary reviewed this proposed rule as required under the Order and determined that it will not have federalism implications. The Secretary certifies that the proposed rule will not have an effect on the States or on the distribution of power and responsibilities among various levels of government when the final rule is issued.

Paperwork Reduction Act

Sections 9.3(a)(7)(v)(C), 9.6(c)(6), 9.6(d), 9.8(a)(4), 9.11(a), 9.11(b)(1)(ii), and 9.12(b) of this proposed rule contain reporting information collection requirements that are subject to OMB approval under the Paperwork Reduction Act of 1995, as amended (44 U.S.C. chapter 35). Sections 9.3(a)(11), 9.4(c)(1), 9.4(c)(3), 9.5(c)(4), 9.5(e), 9.6(c)(8), 9.6(c)(10), 9.8(a)(1–4), 9.8(b), 9.9(c), 9.10(a)(1), 9.10(a)(2), 9.10(b)(1), 9.11(a), 9.12(b), contain record keeping requirements which also are subject to OMB approval under the Paperwork Reduction Act. In addition, elements of disclosure are found in sections 9.3(a)(13), 9.4(c)(2), 9.5(c), 9.5(e), 9.5(f)(2), 9.6(c)(10), 9.9(a)(3), 9.10(a)(1), 9.10(b)(1), and 9.11(a). The title, description, and respondent description of the information collection and record keeping requirements contained in the proposed rule have been submitted to OMB for review. Other organizations and individuals desiring to submit comments on the information collection and record keeping requirements should send their comments to (1) Dr. Charles MacKay, Project Clearance Officer, National Institutes of Health, Rockledge Centre 1, 6705 Rockledge Drive, Room 3509 Bethesda, Maryland 20817, telephone 301–435–0978 (not a toll-free number); and (2) the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 10235, 725 17th Street, NW., Washington, DC 20503. Attention: Desk Officer for the National Institutes of Health, Department of Health and Human Services. After we obtain OMB approval, we will publish the OMB control number in the **Federal Register**.

Title: Standards of Care for Chimpanzees Held in the Federally-supported Chimpanzee Sanctuary System.

Description: The information collections and record keeping will be used by NIH and the Sanctuary contractor and subcontractors to document proper and adequate care, identification, accountability, billing, regulatory compliance, and adherence to contract specifications and terms.

Respondent Description: Private nonprofit entities or institutions

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

	Annual number of respondents*	Annual frequency	Avereage burden (hours)	Annual burden hours per response
Reporting:				
§ 9.3(a)(7)(v)(C)	1–3	2	6	12
§ 9.6(c)(6)	1–3	3	2	6
§ 9.6(d)	1–3	2	0.5	1
§ 9.8(a)(4)	1–3	4	5	20
§ 9.11(a)	**1–3	1	1	12
§ 9.11(b)(1)(ii)	**1–3	6	2	12
§ 9.12(b)	1–3	1	6	6
Subtotal	.....	19	22.5	69
Recordkeeping:				
§ 9.3(a)(7)(v)(c)	1–3	2	2	4
§ 9.3(a)(10)	**1–3	1	8	8
§ 9.3(a)(11)	**1–3	1	8	8
§ 9.4(c)(1)	1–3	1	1	1
§ 9.4(c)(3)	1–3	1	6	6

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN—Continued

	Annual number of respondents*	Annual frequency	Avereage burden (hours)	Annual burden hours per response
§ 9.5(c)(4)	1–3	1	2	2
§ 9.5 (e)	1–3	1	4	4
§ 9.6(c)(8)	1–3	5	0.05	0.25
Subtotal		13.00	31.05	33.25
§ 9.6(c)(10)	1–3	4	0.1	0.4
§ 9.8(a)(1–4)	1–3	1	0.5	5
§ 9.8(b)	1–3	5	2	10
§ 9.9(c)	1–3	12	0.2	2.4
§ 9.10(a)(1)	1–3	12	0.2	2.4
§ 9.10(a)(2)	1–3	4	3	12
§ 9.10(b)(1)	1–3	3	1.5	4.5
§ 9.11(a)	***1–3	6	1	6
§ 9.12(b)	***1–3	1	3	3
Subtotal		48	11.50	43.30
Disclosure:				
§ 9.3(a)(10)**	1–3	6	0.5	3
§ 9.3(a)(11)**	1–3	1	0.5	1
§ 9.3(a)(13)	1–3	1	1	1
§ 9.4(c)(2)	1–3	1	0.1	0.1
§ 9.5 (c)	1–3	1	8	8
§ 9.5(e)	1–3	****1	2	2
§ 9.5(f)(2)	1–3	0.2	8	1.6
§ 9.6(c)(10)	1–3	4	0.1	0.4
§ 9.9(c)	1–3	10	0.2	2
§ 9.10(a)(1)	1–3	10	0.2	2
§ 9.10(b)(1)	1–3	1	0.2	0.2
§ 9.11(a)***	1–3	2	1	2
Subtotal		38.2	21.8	23.3
Total	1–3	118.2	.85	168.25

* Presently, there is only one (1) respondent, the Contractor for the federally supported Chimpanzee Sanctuary System. The estimates are based upon a maximum of three (3) respondents in the future.

** See also §§ 9.5(c) & 9.5(e).

*** The reporting requirements for these sections vary because it is estimated that chimpanzees will be shipped six (6) times per year. This requires 6 notifications of shipment notices to the Project Officer. While not anticipated, it is possible that approximately one (1) of these shipments might require reporting because of undesirable conditions, a death, failure to provide adequate food or water, or other conditions affecting animal welfare. Such incidents must be reported immediately to the NCRR Project Officer who will in turn work with the USDA representatives in investigating the matter.

**** 1 × event.

List of Subjects in 42 CFR Part 9

Animal welfare, Humane care and treatment of chimpanzees.

Dated: April 28, 2004.

Elias A. Zerhouni,

Director, National Institutes of Health.

Approved: September 29, 2004.

Tommy G. Thompson,

Secretary.

Accordingly, NIH proposes to amend title 42 of the Code of Federal Regulations by adding part 9 to read as follows:

PART 9—STANDARDS OF CARE FOR CHIMPANZEES HELD IN THE FEDERALLY SUPPORTED SANCTUARY SYSTEM

Sec.

Authority: 42 U.S.C. 216, 287a–3a.

§ 9.1 Applicability and purpose.

(a) *General.* The standards of care set forth in this part apply to the chimpanzee sanctuaries that are contracted (or subcontracted) to the Federal Government to operate the federally supported chimpanzee Sanctuary system authorized by section 481C of the Public Health Service (PHS) Act, as amended (42 U.S.C. 287a—3a).

(b) *What is the purpose of the federally supported chimpanzee Sanctuary system and the authority for establishing these standards of care regulations?* The Chimpanzee Health Improvement, Maintenance, and Protection Act (Public Law 106–551, referred to as the ''CHIMP Act'' or ''Chimpanzee Retirement Act'') was enacted by Congress to provide for the establishment and operation of a

Sanctuary system to provide lifetime care for chimpanzees that have been used, or were bred or purchased for use, in research conducted or supported by the agencies of the Federal Government, and that are determined to be no longer needed for such research. The CHIMP Act also mandates that standards of care for chimpanzees in the Sanctuary shall be developed to ensure the well-being of chimpanzees and the health and safety of the chimpanzees.

(c) *To what chimpanzee sanctuaries do the standards of care in this part apply?* The standards of care set forth in this part apply to only those sanctuaries that are contracted or subcontracted to the Federal Government to operate the federally supported chimpanzee Sanctuary system.

§ 9.2 Definitions.

As used in this part:

Adequate veterinary care means a program directed by a veterinarian qualified through training and/or experience to provide professional medical care to the chimpanzees within the Sanctuary and with the appropriate authority to provide this care. The program also provides guidance to all caregivers on all matters relating to the health and well-being of the chimpanzees.

American Zoo and Aquarium Association (AZA) means the professional society comprised of individuals with various backgrounds and interests that is devoted to advancing the knowledge and understanding of zoo animals and the management of zoos in the United States.

American Zoo and Aquarium Association (AZA) Accreditation Standards are those standards developed by the AZA that are used to review, evaluate, and accredit zoos or zoological gardens. These standards cover a variety of areas including facilities, policies and procedures, training, staff qualifications, medical and animal care, husbandry and well-being procedures, and conservation, along with other specific areas.

Animal Care and Use Committee means the Institutional Animal Care and Use Committee established under section 13(b) of the Animal Welfare Act of 1985 and the Health Research Extension Act of 1985. For the purpose of these Standards of Care, it shall consist of at least five (5) members including the Chairperson, a Doctor of Veterinary Medicine (D.V.M. or V.M.D.) knowledgeable in nonhuman primate care and diseases and with delegated program responsibility, a member not affiliated with the Sanctuary, a scientist, and a member of the animal protection community. This Committee is required if research as defined by the Animal Welfare Act Regulations and the Public Health Service Policy (research, teaching, testing, exhibition) is to be conducted at the Sanctuary.

Animal protection organization means a nonprofit organization whose primary mission is protection of animals through positive advocacy and action.

Animal Resource Manager (or Animal Resource Supervisor) means the individual employee responsible for managing the non-professional staff providing care for the chimpanzees at the Sanctuary. This individual may perform other duties as assigned by the Sanctuary contractor.

Animal Welfare Act/Regulations means the Act of August 24, 1966 (Pub. L. 89–544), (commonly known as the Laboratory Animal Welfare Act) as amended by the Act of December 24, 1970 (Pub. L. 91–579), (the Animal Welfare Act of 1970), the Act of April 22, 1976 (Pub. L. 94–279), (the Animal Welfare Act of 1976), and the Act of December 23, 1985 (Pub. L. 99–198), (the Food Security Act of 1985), and as may be subsequently amended, and the United States Department of Agriculture (USDA) regulations implementing the Animal Welfare Act in title 9, chapter 1, subchapter A of the CFR.

Animal Welfare Assurance means the documentation from an institution assuring compliance with the PHS Policy on Humane Care and Use of Laboratory Animals. This policy is administered by the Office of Laboratory Animal Welfare (OLAW), National Institutes of Health.

Association for Assessment and Accreditation of Laboratory Animal Care, International (AAALAC) means the nonprofit organization that is recognized in the United States and abroad as being the body responsible for the accreditation of laboratory animal programs.

Behaviorist means a person hired by the Sanctuary to administer or oversee the enrichment and behavioral program for the chimpanzees at the Sanctuary. This individual must be qualified through training or experience.

Biosafety Officer means the individual responsible for establishing and monitoring workplace safety procedures designed to minimize or prevent injury or loss due to biohazards in accordance with policies established by the Sanctuary administration.

Board of Directors (BOD) means the individuals selected by the Contractor to govern the nonprofit institution responsible for operating the federally supported chimpanzee Sanctuary system. The board members must meet the qualifications and criteria stated in the CHIMP Act.

Chair of the Board of Directors means the individual chosen by the BOD or other legally empowered entity to carry out such action, who is responsible for chairing meetings and acting on behalf of the board. This individual reports directly to the board.

Chief Executive Officer (CEO) means the principal person responsible for overall accomplishment of the mission of the chimpanzee Sanctuary.

CHIMP Act means the Chimpanzee Health Improvement, Maintenance, and Protection Act of December 20, 2000 (Pub. L. 106–551) commonly known as the ''CHIMP Act'' or ''Chimpanzee Retirement Act,'' and any future amendments.

Chimpanzee means a member of *Pan troglodytes*. It excludes the pygmy chimpanzee (*Pan paniscus* or bonobo).

Chimpanzee caregivers (caregivers) means all Sanctuary technical and husbandry staff providing long term care and services for the chimpanzees.

Contractor/Primary Contractor/ Sanctuary Contractor means the nonprofit entity awarded a contract by the Federal Government to establish and operate the chimpanzee Sanctuary system.

Euthanasia means the humane death of a chimpanzee accomplished by a method that produces rapid unconsciousness and subsequent death without evidence of pain or distress. The method must be consistent with the recommendations of the American Veterinary Medical Association Panel on Euthanasia.

Exhibition means exhibiting chimpanzees to the public for compensation. It specifically excludes limited viewing for educational purposes.

Facility director means the individual responsible for directing the overall activities at the Sanctuary site.

Facility Veterinarian means a person who has graduated from a veterinary school accredited by the American Veterinary Medical Association (AVMA) Council on Education, or who has a certificate issued by the AVMA's Education Commission for Foreign Veterinary Graduates; has training and/or experience in the care and management of nonhuman primates; and has direct or delegated authority for activities involving chimpanzees at the federally funded chimpanzee Sanctuary.

Federal agency means an executive agency as such term is defined in section 105 of title 5, United States Code, and refers to the agency from which the research facility receives a

Federal award for projects involving animals.

Federal Acquisition Regulations (FAR) means the codified rules applicable to contracts, specifically those sections of the FAR (48 CFR chapter 1, part 52) that are applicable to contracts between the Federal Government and a contractor (in this case a private, nonprofit entity under contract to operate the chimpanzee sanctuary system).

Federally-owned chimpanzees mean chimpanzees that have been purchased by, bred by, or donated to a Federal agency for use in biomedical/behavioral research. Chimpanzees whose ownership was subsequently transferred from Federal ownership via written transfer agreements are no longer federally-owned. Newborn chimpanzees generally belong to the same entity that owned the mother at the time of the baby's birth.

Guide means the ''Guide for the Care and Use of Laboratory Animals'' published by the National Academy of Sciences, Institute for Laboratory Animal Research of the National Research Council.

Housing facility means any land, premises, shed, barn, building, trailer, or other structure or area housing intended to house chimpanzees.

Indoor housing facility refers to any structure or enclosure (*e.g.,* cages, pens, rooms) for maintaining animals in a controlled environment that provides for normal physiological and behavioral needs.

International Species Information System (ISIS) means the organization that provides the chimpanzees in zoos, research facilities, exhibitors, etc., with a unique identification number that can be used to track and account for chimpanzees around the world.

Interstate air transport live animals (IATA) regulations means those regulations and standards covering the air transportation of nonhuman primates developed and implemented by the International Air Transportation Association.

Invasive research (studies) utilizes those procedures that cause more than momentary pain, distress, fear, discomfort, injury, or other negative modalities to a chimpanzee. Any procedure that enters or exposes a body cavity is considered to be invasive. Except as outlined in the CHIMP Act, Sanctuary chimpanzees may not be used in invasive research. Some examples of invasive studies are:

(1) Experimental exposure to a substance that may be detrimental to a chimpanzee's health (*e.g.,* infectious disease, radiation). This does not include accidental exposures to infectious diseases transmitted from cage mates, or from radiation or other exposures at the time of regularly scheduled or necessary veterinary examinations and treatments;

(2) Any invasion of a body cavity;

(3) Surgery and surgical implantation of devices. Procedures of this nature performed for non research or study purposes are allowable when the Sanctuary staff determine they are needed for veterinary medical or colony management purposes and is in the best interest of the chimpanzee or the chimpanzee colony;

(4) Behavioral studies that cause distress or discomfort, such as induction of a fear response;

(5) Testing of any drug;

(6) Purposeful manipulation of social groups or the removal or addition of individuals in order to conduct behavioral research (*e.g.,* on aggression). Creation and refinement of social groups will be necessary when the animals arrive at the Sanctuary and this should take place only when necessary in regards to colony management and should not be driven by independently initiated research studies;

(7) Restraint unless it is in conjunction with the annual exam or clinical care; and

(8) Darting or anesthesia induction other than at annual exam or in the case of an emergency in which the chimpanzee's well-being is at stake.

National Primate Research Center (NPRC) means those centers supported by the National Center for Research Resources, National Institutes of Health, Department of Health and Human Services, as national resources for providing high-quality nonhuman primate research resources and facilities. As of November 2003, there were 8 such centers.

National Research Council means the component of the National Academy of Sciences that advises the Federal Government on matters related to science, research, and research resources.

Non-invasive research (studies) means the use of procedures that depend upon close observation of chimpanzee behavior or on medical information collected during the course of normal veterinary care. These procedures do not require removal of the chimpanzees from their social group or environment, or require a separate anesthetic or sedation event to collect data or record observations. Some examples of non-invasive studies are:

(1) Visual observation;

(2) Behavioral studies designed to improve the establishment and maintenance of social groups. These activities may cause stress as a result of novel interactions between chimpanzees and between chimpanzees and caregivers, but they are not considered invasive as long as they are intended to maximize the well-being of the chimpanzees;

(3) Medical examinations as deemed necessary to oversee the health of the chimpanzees, in the least invasive manner possible. Collection of samples routinely obtained during a physical examination for processing during this time is also considered noninvasive since a separate event is not required;

(4) Administration and evaluation of environmental enrichment used to promote the psychological well-being of the chimpanzees; and

(5) Actions taken to provide essential medical treatment to an individual chimpanzee exhibiting symptoms of illness. This applies only to serious illness that cannot be treated while the chimpanzee remains within the colony.

Non-federally owned chimpanzees mean chimpanzees that have not been purchased by, bred by, or donated to the Federal Government for use in federally supported research projects. In accordance with the CHIMP Act, chimpanzees owned on the date of passage of the CHIMP Act by a National Primate Research Center may enter the Sanctuary system without requiring the NPRC to pay a fee.

Outdoor housing facility (area) means corrals, Primadomes (a prefabricated outdoor housing unit), fenced open areas, or similar structures or areas, for maintaining chimpanzees with access to adequate protection from the extremes of environmental elements and harsh weather conditions.

Outdoor ranging area means an area that allows chimpanzees greater ranging space than corrals or other outdoor housing area, and includes a variety of vegetation, shrubbery, grasses and trees, thereby providing for a fairly unrestricted natural setting for the chimpanzees to engage in species appropriate activities. The area is secured by an outer perimeter barrier.

Project Officer means the individual designated by the Federal Government to represent the contracting officer and interests of the Federal agency, within defined areas, in monitoring and overseeing the chimpanzee Sanctuary system contract.

Sanctuary or federally supported chimpanzee Sanctuary system means the Sanctuary or Sanctuary system established by the Federal Government through contracting with a private, nonprofit entity, for the purpose of carrying out the provisions of the

CHIMP Act of 2000. The system includes a primary Contractor and may include additional subcontractors as required. This Sanctuary system is supported primarily from funds allocated by the NCRR/NIH/DHHS with some matching funds from the nonprofit contractor.

Sanctuary Chimpanzee Care Committee (SCCC) or similar designated committee means the group of individuals designated by the CEO of the Sanctuary that reviews and monitors adherence to the policies, procedures, and regulations at the Sanctuary.

Sanctuary Contractor means the nonprofit, private entities selected by the NCRR/NIH to develop and operate the chimpanzee Sanctuary system. This Contractor is also known as the ''primary contractor'' for the Sanctuary system.

Sanctuary Director means the individual who provides day to day direction and oversight to the employees responsible for performing the daily tasks at the facility.

Secretary means the Secretary of Health and Human Services or his/her designee.

Subcontractor means a private, nonprofit entity selected by the primary contractor to provide additional Sanctuary services.

Surplus chimpanzees means chimpanzees that are no longer needed in research, and that were used, or were bred or purchased for use in research conducted or supported by the Federal Government.

USDA licensed intermediate handler/carrier means any person, including a department, agency, or instrumentality of the United States or of any State or local government, who is engaged in any business in which it receives custody of animals in connection with their transportation in commerce and who is licensed by the USDA.

Zoonotic disease(s) means diseases that are transmissible from chimpanzees to humans.

§ 9.3 Sanctuary policies and responsibilities.

(a) *What are the policies and responsibilities governing the Sanctuary system?* It will be the policies and responsibilities of the Sanctuary system to:

(1) Create a safe and species-appropriate physical and social environment for the lifetime care of chimpanzees;

(2) Comply with all applicable provisions of the animal welfare regulations and other Federal, State and local laws, regulations and policies;

(3) Achieve accreditation from appropriate accrediting bodies within a reasonable time frame mutually agreed upon by the contractor and NCRR;

(4) Prohibit any invasive research on the resident chimpanzees but permit non-invasive studies (as authorized in 42 U.S.C. 287a-3a) that do not compromise the well-being of the chimpanzees and that are approved by an appropriate Sanctuary Chimpanzee Care Committee. Definitions for the terms ''invasive'' and ''non-invasive'' are set forth in § 9.2 of this part;

(5) Prohibit exhibition of chimpanzees in the Sanctuary. This policy does not prohibit educational activities that may involve limited viewing of chimpanzees in their environment and that are designed to promote an understanding of chimpanzee behavior, well-being, or importance to the ecological system;

(6) Staff the organization with people with appropriate training and experience; and

(7) Establish a Sanctuary Chimpanzee Care Committee (SCCC) responsible for oversight of the facility programs and operations to ensure the health and well-being of the chimpanzees and the occupational safety of the staff. The Committee must consist of no fewer than five people who should include the sets of experiences or qualifications in the following paragraphs (a)(7)(i) through (v):

(i) A chair (person) knowledgeable of the needs of chimpanzees;

(ii) A veterinarian with chimpanzee care experience;

(iii) A behaviorist with experience in chimpanzee behavior;

(iv) A member of the chimpanzee care staff; and

(v) Member or members from the community, including at least one with affiliation or employment with an animal protection organization as defined in section 9.2 of this part.

(vi) The Sanctuary Chimpanzee Care Committee will:

(A) Oversee and evaluate the chimpanzee care and socialization program;

(B) Review and approve proposed education programs that might interfere with the chimpanzees' well-being or routine activities;

(C) Conduct a formal review of the program on a semiannual basis and submit reports to the Sanctuary director and Board of Directors. The reports must be available for review by the USDA and NIH representatives during site visits;

(D) Establish a mechanism for receipt and review of concerns involving the care of chimpanzees and resolving such concerns; and

(E) Review all study proposals and all euthanasia events. The SCCC membership may require additional qualified individuals to perform the functions of an Animal Care and Use Committee (ACUC) if and when the need arises. The contractor may establish a separate ACUC. The ACUC must be established in accordance with the applicable provisions of the Animal Welfare Act regulations. Euthanasia events performed for medical or humane reasons will be based upon sound professional veterinary judgment that conforms to current veterinary medical practices and must be in the best interest of the chimpanzee. Euthanasia performed for emergency reasons without an advance review by the SCCC shall be reviewed by the SCCC as soon as possible after the event to assure compliance with established policy.

(8) Establish procedures to prevent any reproduction in the colony through appropriate permanent birth control, preferably by vasectomy of all sexually mature male chimpanzees in the Sanctuary;

(9) Assure that chimpanzees accepted into the Sanctuary are not discharged for any reason, except as provided for in section 481C(d)(3) of the Public Health Service Act as added by section 2 of the CHIMP Act;

(10) Develop procedures for chimpanzees that are seropositive for or harboring infectious agents, or have been previously exposed to infectious agents (whether experimentally-induced or naturally-occurring), that will allow them to be accepted by the Sanctuary and properly housed; the procedures must be submitted to the NCRR for approval;

(11) Develop guidelines for accepting chimpanzees not owned by the Federal Government into the Sanctuary if the conditions are met as outlined in 42 U.S.C. 287;

(12) Assure that the Board of Directors of the primary contractor consist of no more than thirteen (13) individuals and that the conditions governing the terms of the board members comply with the CHIMP Act. The Board of Directors must include individuals with the following expertise and experience as set forth in the CHIMP Act. Subcontractors, if applicable, shall be governed by the policies developed by the Board of Directors of the primary contractor:

(i) At least one veterinarian that is qualified in veterinary care of nonhuman primates. These qualifications may be met through postdoctoral training, experience, or both;

(ii) Individuals with expertise and experience in zoological science and

with knowledge in behavioral primatology;

(iii) Individuals with experience in the animal protection field;

(iv) Individuals with experience and expertise in the field of business and management of nonprofit organizations;

(v) Individuals knowledgeable and experienced in accrediting programs of animal care;

(vi) Individuals with experience and expertise in containing biohazards;

(vii) A member who serves as the Chair of the Board of Directors. This member may be elected or appointed by the Board from individuals identified in paragraphs (a)(12)(i) through (vi) of this section; and

(viii) No member of the board shall have been fined for, or signed a consent decree, for any violation of the Animal Welfare Act.

(13) Assure that a chimpanzee may be removed from the Sanctuary for research purposes only if the Secretary determines that the provisions of the CHIMP Act are met. In accordance with the provisions of the CHIMP Act, the removal of a chimpanzee from the Sanctuary for research requires a recommendation from the contractor's Board of Directors, and publication in the **Federal Register** of a notice of intent for public comment for a period not less than 60 days. The final decision rests with the Secretary. Ownership of chimpanzees removed for that purpose remains with the Sanctuary (or the Federal Government) and all chimpanzees removed for research must be returned to the Sanctuary when the studies are completed.

(b) *Who is responsible for developing or revising Sanctuary policies?* (1) The Sanctuary contractor is responsible for developing, revising, and implementing policies affecting the Sanctuary.

(2) The Federal agency (NCRR/NIH) designated by the Secretary must concur with any changes that substantially change existing policies. The Secretary, or designee, will determine if a policy change will have a substantial impact upon current policy after consultation with the Sanctuary contractor.

§ 9.4 Physical facility policies and design.

(a) *What standards apply to the facility design and physical plant?* (1) The chimpanzee Sanctuary facility must be designed to provide sufficient space and variety of natural or artificial objects to accommodate natural activities of chimpanzees while restricting their movement and range to the defined area. Cages, compounds, and all housing areas shall be designed to withstand the continuous and harsh assaults common when chimpanzees are confined. It is highly recommended that the Sanctuary administrators engage a design firm that is experienced in designing chimpanzee facilities or demonstrates the capability to involve individuals possessing such experience. Housing areas appropriate for the complex social behavior of chimpanzees should allow them to express a full range of species typical behavior. The facility design and physical plant consists of the following components: indoor design features; outdoor design features; construction and construction materials; physical barriers; shelter; service support space, including storage areas for food, supplies, and equipment; personnel and administrative support space; quarantine and isolation facilities; treatment area; heating, ventilation, and air conditioning (HVAC); food preparation area; and animal waste treatment.

(2) Primary enclosures must promote chimpanzee well-being and provide a safe and sanitary environment for both the chimpanzees and their human caregivers and attendants, safe and sanitary environment for both the chimpanzees and their human caregivers and attendants, and allow for behavioral needs of the species. Daily observation of chimpanzees within the enclosures is required and shall be accomplished with minimal disturbance to the chimpanzees. A housing system shall include indoor and outdoor enclosures that must be kept in good repair to prevent escape and injury to the chimpanzees, promote physical comfort, and facilitate sanitation and servicing:

(i) Indoor areas shall have special areas for social introductions and medical treatment. Indoor design features will generally include rooms, units, gates and passage corridors to allow for transferring and isolating chimpanzees for medical procedures, protection from aggression, etc. The floor surfaces must not be slippery; and the floors and walls should be sealed to facilitate proper sanitation. Doors to the chimpanzee housing areas shall not open directly to the outside, unless they open into enclosed outdoor housing or free-ranging areas. Indoor containment materials must be well anchored, durable, and free of sharp or jagged edges to prevent escape or injury to the chimpanzees. Light fixtures must be sealed to prevent the introduction of moisture. Lighting must be adequate for appropriate animal care and observation, but not disruptive or harmful to the chimpanzees. Furnishings for climbing, resting, swinging, and sleeping must be durable, nontoxic, comfortable and easily sanitized or replaceable when soiled;

(ii) Primary housing in a Sanctuary must include large outdoor compounds, corrals, or other ranging areas. The Sanctuary should be in an area with a climate suitable for chimpanzees to reduce the need for long-term, indoor housing. Outdoor ranging areas must provide enough space for the formation of social groups of varying sizes, ages and sexes. Chimpanzee facilities must have areas for social introductions and medical treatment. During the design and construction of the facility, special consideration must be given to plans for removing chimpanzees from the ranging area for emergency and routine procedures. Primary barriers must be constructed to prevent escape of chimpanzees and secondary or perimeter barriers should prevent entry of unauthorized persons into the facility. Grasses, hay, bamboo, or other material suitable for nest building should be available in the ranging area and artificial objects that simulate or enhance the natural environment may be used to further promote chimpanzee well being;

(iii) Primary enclosures must be constructed with materials that balance the needs of the chimpanzees with the ability to provide for sanitation. They must have smooth impervious surfaces with minimal ledges, angles, corners, and overlapping surfaces so that accumulation of dirt, debris, and moisture is reduced and satisfactory cleaning and disinfecting are possible. Less durable material, such as non pressure treated wood, can provide a more appropriate environment in some situations (such as runs, pens, and outdoor corrals) and can be used to construct perches, climbing structures, resting areas, and perimeter fences for primary enclosures. Wooden items must be replaced when they become damaged or difficult to sanitize. All primary enclosures must be kept in good repair to prevent escape of and injury to chimpanzees, promote physical comfort, and facilitate sanitation and servicing. Damaged, rusting or oxidized equipment that threatens the health or safety of the chimpanzees must be repaired or replaced;

(iv) Physical barriers must be designed to contain the chimpanzees within the Sanctuary grounds and to prevent the intrusion of unauthorized persons. Some examples of barrier structures include properly and safely designed water moats, strong chain link fencing with curved or ''V'' shaped barbed wire topping, solid concrete, brick, or pre-cast concrete walls, and electrical fences. Each Sanctuary site

may choose the type of barrier that is suitable for that location;

(v) Outdoor facilities must provide either natural or artificial structures that chimpanzees can use for shelter to escape rain, direct sun, wind, and extreme temperatures. Indoor and outdoor housing units can serve this purpose when chimpanzees are confined to smaller outdoor facilities;

(vi) Personnel and administrative support space must be appropriately designed and provided to adequately accommodate the technical, managerial, professional, and administrative staff;

(vii) Quarantine and isolation facilities are required for the Sanctuary. These facilities must be designed to prevent the spread of undesirable agents from quarantine and isolation rooms to other parts of the facility. These facilities may also be used to isolate incoming chimpanzees to evaluate and to assess their behavior before assimilation into the resident population. Sufficient space must be designed in the area to accommodate a station that provides protective equipment for the staff and others to be worn when entering areas housing the chimpanzees. Shower, toilet and locker facilities must be located within or near the quarantine and isolation areas for preventative health and sanitation reasons. Provisions for enrichment in quarantine areas must also be made;

(viii) An area for treatment of and performing veterinary clinical procedures on chimpanzees must be provided at each Sanctuary site. This area must be constructed and provisioned to perform emergency procedures, including minor surgery and emergency surgical procedures if needed, and complete physical examinations. The Sanctuary must provide facilities for extended care of medical conditions as the need arises. Emergency treatment carts must be available for emergency situations when a chimpanzee requires on-site treatment. Aging chimpanzees present special medical challenges that should be addressed in the preventative medicine and animal health plan; and

(ix) Heating, ventilation, and air-conditioning (HVAC) must comply with the standards of the Guide when chimpanzees must be confined to closed, indoor quarters for isolation, treatment or other situations on a short-term basis. It is critical to provide ventilation that allows chimpanzees to seek a thermo-neutral zone that fits their needs. In general, the design of the Sanctuary facility can be such that the mechanical systems may not be required, except in tightly closed areas. The use of shelters, nesting materials, circulating fans, and space heaters are examples of means that address the comfort needs of the chimpanzees.

(x) Support facilities must be appropriate for the goals of the facility. In accordance with the Guide and the Animal Welfare Regulations, and currently available data, several types of functional support areas are required, including veterinary treatment and surgery, quarantine, food storage, bedding storage (if used), dry storage, administrative space, and equipment.

(xi) Animal waste from the Sanctuary must be properly treated to remove known hazardous agents before discharging it into the environment in accordance with currently acceptable and effective waste treatment procedures including current industry standards and Federal, State, and Local governmental guidelines and regulations.

(b) *What security measures are required for the Sanctuary?* The Sanctuary must provide adequate security against unauthorized entry, sabotage, malicious damage, theft of chimpanzees and property, and minimize any chance of escape by a chimpanzee. The security staff must have training and/or experience in methods and equipment designed to detect possible security breaches and the ability to respond to security events in a timely and effective manner. Perimeter containment shall be used to protect the compound housing the chimpanzees consistent with the recommendations of the Guide.

(c) *Is the Sanctuary required to develop disaster and escaped animal contingency plans?* (1) The Sanctuary facility must prepare contingency plans outlining simple and easy to follow plans for dealing with natural and manmade disasters and steps to be taken in case a chimpanzee escapes from the compound. Separate plans will be developed for disasters and recovery of escaped chimpanzees. These plans must be prepared prior to the arrival of chimpanzees at the facility. All employees with responsibilities under the plans must be familiar with the contents of each plan and able to execute the plans when a situation occurs. Incidents and actions taken must be documented for future reference.

(2) As a minimum, the disaster plan must identify disasters likely to occur in the area, including severe rainstorms, crippling snowstorms, forest fires, sabotage and hurricanes, that may endanger the lives of the chimpanzees or staff, the names and telephone numbers of persons to contact in the event of an emergency, procedures to be followed in collecting and securing chimpanzees, local or state services that may be required, and the person or persons responsible for determining final action. Personnel required to respond to a disaster must obtain any special identification cards needed to report to duty. Other elements considered appropriate to addressing disasters should be added by the Sanctuary contractor if necessary.

(3) The design of the perimeter security must be such that chance for escape of a chimpanzee is minimized. A well-prepared, properly crafted plan can lead to decisive actions being taken to recapture the chimpanzee in a timely fashion. The plan must be designed to minimize or eliminate injury to the chimpanzee and the persons attempting to gain control of the escaped chimpanzee. Details must include step-by-step procedure options for capture, person(s) to contact, person(s) or organizational unit(s) required to respond to an alert due to an escape, transportation back to the Sanctuary facility, and how corrective actions will be implemented to prevent future incidents.

(d) *Incorporation by reference.* The Guide for the Care and Use of Laboratory Animals published by the National Research Council (Guide), 1996, International Standard Book Number 0–309–05377–3, is incorporated by reference in this section. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the publication from the National Academy Press, 2101 Constitution Avenue, NW., Lockbox 285,Washington, DC 20055; or you may order it electronically via the Internet at *http://www.nap.edu*; or view it online at *http://oacu.od.nih.gov/regs/guide/guidex.htm.* You may inspect a copy at NIH, NCRR, 1 Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20817–4874, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

§ 9.5 Chimpanzees ownership, fees, and studies.

(a) *Who owns the chimpanzees in the federally supported Sanctuary?* The Federal government retains ownership of chimpanzees owned by the Federal government at the time they enter the Sanctuary system. Non-federally owned or supported chimpanzees will be

owned by the Sanctuary. The chimpanzees shall continue to be maintained in the Sanctuary throughout their lifetime and shall not be discharged from the Sanctuary except as specifically indicated in the CHIMP Act.

(b) *Is there a charge for placing chimpanzees in the Sanctuary?* No fees shall be charged for federally owned or supported chimpanzees entering the Sanctuary. Chimpanzees that were owned by a NPRC when the CHIMP Act became effective are also admitted without payment of fees. Fees for maintenance of the chimpanzees alluded to above are provided for in the contract between the Federal Government and the Sanctuary contractor.

(c) *May the Sanctuary agree to accept chimpanzees that are not owned by the Federal Government?* The Sanctuary may accept chimpanzees that are not owned by the Federal Government subject to the following conditions:

(1) Ownership of the chimpanzee must be transferred to the Sanctuary;

(2) Fees for these chimpanzees may be levied based on a range of considerations that include most importantly, the well-being of the chimpanzee, and secondarily factors that include (but are not limited to) the resources available to support the chimpanzee, the health, age and social history of the chimpanzee, and other relevant factors affecting the cost of caring for the chimpanzee;

(3) Available space exists in the Sanctuary; and

(4) An agreement exists between the Sanctuary system and the NCRR/NIH documenting that the chimpanzee may be brought into the Sanctuary.

(d) *What additional conditions apply when non-governmentally-owned chimpanzees transfer to the chimpanzee Sanctuary?* The following additional conditions apply when non-governmentally-owned chimpanzees transfer to the chimpanzee Sanctuary:

(1) Chimpanzees transferred to the Sanctuary sites must be permanently incapable of reproduction, for example, by vasectomy or tubal ligation;

(2) Complete histories must accompany each chimpanzee. Any chimpanzee missing documentation for any period of research or other use may not be transferred to the Sanctuary without the concurrent authorization of the Sanctuary contractor's Board of Directors and the NCRR; the records may be created and retained in electronic form; and

(3) Appropriate screening of each chimpanzee must be performed to assess the likelihood of the chimpanzee being a health or safety threat to the care staff, and/or other chimpanzees.

(e) *What are the criteria for acceptance and the fees for admission into the Sanctuary for non-governmentally-owned chimpanzees?* The chimpanzee Sanctuary contractor, in conjunction with the NCRR, must establish criteria and a fee system for acceptance of non-governmentally-owned chimpanzees. Funds collected for this purpose must be accounted for and used to help defray the expenses incurred in operating the Sanctuary.

(f) *Under what circumstances might a chimpanzee from the Sanctuary be returned to research at a United States research facility?* (1) The CHIMP Act provides details for the return of chimpanzees to research for a specific need as determined by the Secretary. While the likelihood of a chimpanzee from the Sanctuary being returned to research is remote based upon current consensus, the CHIMP Act does provide for such event. The Act lists several conditions that must be met prior to initiating any research on a chimpanzee in the Sanctuary and before the Secretary can grant approval. These conditions are:

(i) The chimpanzee in question possesses unique characteristics (based upon prior use or medical history) that are not found in other chimpanzees outside of the Sanctuary;

(ii) Technological or medical advances have occurred that were not available at the time the chimpanzee was accepted into the Sanctuary and that such advancement can and will be used in the research;

(iii) The research is essential to an important public health need;

(iv) The research design involves minimal pain, physical or psychological harm, distress, and disturbance to the chimpanzee or social group.

(2) The evaluation by the Board of Directors of the Sanctuary of whether the proposed research satisfies the criteria above will be forwarded to the Secretary for a final determination. Prior to rendering a final decision, the Secretary will publish in the **Federal Register** the proposed findings of the Secretary, the findings of the Board of Directors, and the evaluation by the Secretary. The Secretary will solicit public comment on the proposal for not less than 60 days before making a final decision. This process is designed to ensure a thorough review of the proposal, including input from the public, and to reduce or eliminate arbitrary findings by the Board of Directors. An additional condition for approved use is that the applicant for such use has not been fined or signed a consent decree for any violation of the Animal Welfare Act.

§ 9.6 Animal care, well-being, husbandry, veterinary care, and euthanasia.

(a) *What are the requirements for promoting the well-being of Sanctuary chimpanzees?* The goal of chimpanzee housing and management in the Sanctuary is to promote the chimpanzees' well-being. Long-term care staff shall have the expertise and the commitment to plan, administer, and evaluate the effectiveness of the well-being program. The staff behaviorist will evaluate the well-being of individual chimpanzees and develop programs to improve the life of Sanctuary chimpanzees in general.

(b) *What are the provisions for daily chimpanzee husbandry and care?* Adequate and proper care for chimpanzees in the Sanctuary must be provided with respect to physical environment, housing and husbandry, behavioral management, and population management and control. Specific requirements include the following:

(1) Physical Environment/Husbandry/Housing. (i) *Husbandry*. Chimpanzees must have access to food, water, and bedding (if appropriate) at all times, unless medical or behavioral conditions dictate otherwise. Husbandry procedures shall represent current policies and practices and conform to standards set by a nationally recognized accrediting association. Indoor primary enclosures must be cleaned at least once daily or as often as required to maintain a clean and healthful environment. Outdoor enclosures must be monitored and, if necessary, a plan to handle excessive waste accumulation must be established and implemented as needed. Outdoor ranging areas as a rule will not require a routine cleaning schedule, but must be monitored and maintained if there is an excessive accumulation of waste that is unsanitary, or when other potentially unhealthy conditions exist. Feeding and watering implements must be sanitized at intervals required to maintain them in a sanitary condition. The minimum interval shall be as stated in the ''Guide;''

(ii) *Indoor housing.* Indoor housing areas shall provide sufficient space for chimpanzees to perform species-typical behavior and expression. Examples of such activities include but are not limited to natural movements, climbing, swinging, resting, group interactions, sleeping, etc. At a minimum, chimpanzees confined to cages, runs, or similar enclosures shall be housed in pairs or larger groups unless contraindicated for medical, behavioral or other justifiable reasons. These

enclosures must be designed to allow any member of the group to disengage from aggression by other chimpanzees through the provision of climbing devices, resting boards, sufficient space, or accessibility to adjoining cages or outdoor cages. Visual, tactile, and auditory contact should be maintained where possible. Primary enclosures must be constructed of sturdy materials that will properly contain chimpanzees. Cages and holding rooms, or similar units, must be capable of being readily sanitized. Primary enclosures will be cleaned as often as required to provide a clean and healthful environment. The Sanctuary must have special areas for social introductions and medical treatment. The design of primary enclosures must be such to allow for shifting of chimpanzees during cleaning procedures to prevent them from being injured during the sanitation process;

(iii) *Outdoor housing.* Primary housing in the Sanctuary must include outdoor compounds or other ranging areas. Enclosures must minimize the potential for escape of chimpanzees and entry of unauthorized persons into the facility. The design must include an area for staff persons to separate themselves from chimpanzee enclosures and the outer perimeter. Outdoor spaces in the Sanctuary must include some element of their natural habitat such as trees, shrubs, grasses, hills, water for drinking, and natural or artificial shelter for retreat from inclement weather. Outdoor ranging areas should provide enough space for the formation of groups or families of varying sizes, ages, and sexes; and

(iv) *Housing conditions.* All indoor and outdoor enclosures must be kept in good repair to prevent escape or injury to the chimpanzees, promote physical comfort, and facilitate sanitation and servicing. Damaged, rusting or oxidized equipment that threatens the health or safety of the chimpanzees must be repaired or replaced promptly.

(2) *Behavioral management.* (i) The federally supported chimpanzee Sanctuary must employ a behavioral scientist knowledgeable in primate behavior and socialization requirements. This individual shall provide primary leadership in developing, implementing, and monitoring the chimpanzee behavioral guidelines for the Sanctuary. Each site must provide sufficient staff technician time to adequately monitor and oversee the activities of the resident chimpanzees;

(ii) *Environmental enrichment and animal well-being.* The staff behaviorist will evaluate the well-being of individual chimpanzees, and develop programs to improve the life of Sanctuary chimpanzees in general. Enrichment of the environment for chimpanzees is required within a federally supported Sanctuary. The goal of all chimpanzee housing and management is to promote a high degree of well-being. The Sanctuary must provide for the expertise to plan, administer, and evaluate the effectiveness of the well-being program. The staff behaviorist will evaluate the well-being of individual chimpanzees, and develop programs when needed to improve the life of Sanctuary chimpanzees in general. In delvoping such programs the behaviorist will access individual chimpanzee experimental and housing history. An environmental enrichment program must be in place to encourage the expression of natural behavior such as social interaction, locomotion, climbing, foraging, resting, playing, manipulating objects, and nest building. Enrichment should be emphasized for chimpanzees that must be confined to smaller, indoor spaces. Chimpanzees must be able to retreat from areas where they feel threatened or agitated by close human encounters or encounters with other chimpanzees;

(iii) *Socialization.* The Sanctuary shall provide an environment that provides the opportunity for chimpanzees to live in a social setting that is compatible with their social needs. In most cases, social housing is an important means of enriching chimpanzee activities. Chimpanzees may be housed individually only if required for quarantine, medical reasons, or behavioral reasons, such as for chimpanzees that have failed several socialization attempts;

(iv) *Nesting, sleeping, and resting.* The Sanctuary must contain sufficient outdoor or ranging space and structures (natural or artificial) for the chimpanzees to build nesting areas for sleeping and resting. The site shall not be located in an area where it is noisy or frequently interrupted by human activity;

(v) *Feeding.* In the native environment, chimpanzee diets consist mainly of fruits and vegetables, insects and occasional small mammals. Chimpanzee foraging and feeding activities occupy a large portion of their waking hours, and these critical behaviors must be accommodated in the Sanctuary facilities. The Sanctuary ranging area should include some of the natural diet consumed in the wild where possible (*e.g.*, leaves, wild fruit, and insects). The chimpanzees must be supplied with a commercially prepared diet, even when the chimpanzees are housed in outside areas, to ensure proper nutrition. Diets shall be supplemented with natural foods when housed indoors or in indoor/outdoor enclosures. This supplementation may also be desirable for chimpanzees housed in large ranging areas. Feeding techniques that are challenging to the chimpanzees are recommended to add variety and enrichment opportunities. Aggressive behavior during feeding must be anticipated and managed to prevent serious injury to the chimpanzees. The special needs of aged chimpanzees must be considered and addressed as they may be sick, have limited movement capabilities, or have other conditions that require special considerations;

(vi) *Play activities.* The Sanctuary must provide ample space or objects for chimpanzees to engage in play activities that are considered appropriate for the species; and

(vii) *Chimpanzee training.* Many chimpanzees can be trained through positive reinforcement to cooperate with a variety of veterinary and chimpanzee care procedures. Efforts must be made to develop or maintain this capability for chimpanzees housed in the Sanctuary to the extent possible.

(3) *Population management and control.* Reproduction of chimpanzees is prohibited in the Sanctuary. Therefore, males must be sterilized by vasectomy before acceptance into the Sanctuary facility or housed apart from females until they are sterilized. Vasectomies are preferable because of their minimal invasiveness and because vasectomies can be validated through laboratory testing of semen. Seminal collection techniques must be carefully evaluated to avoid painful stimuli. Other proven methods of birth control may be used under special conditions deemed appropriate by the Facility Veterinarian and SCCC. The Facility Veterinarian will determine the appropriate test(s) to use to validate sterility. The vasectomy should be performed by a veterinarian experienced in performing vasectomies in chimpanzees. Documentation must accompany each male accepted by the Sanctuary system attesting to the fact that the male has been vasectomized and laboratory tests are negative for sperm. In instances where it is not possible to perform a vasectomy before arrival at the Sanctuary due to extenuating circumstances (such as a lack of on-site expertise), that particular male must be isolated at the Sanctuary from the females until the procedure is performed and the required tests are performed and found to be acceptable.

(c) *What are the requirements for an adequate veterinary care and animal*

health program? (1) *Veterinary care.* The Sanctuary staff must provide sufficient resources of personnel, equipment, supplies, and facilities to enable the provision of adequate veterinary care as set forth in the Guide and in the American College of Laboratory Animal Medicine document on ''The Provision of Adequate Veterinary Care'' available on the Internet at *http://www.aclam.com.* The Sanctuary must provide adequate veterinary care to assure the health of the chimpanzees. If the Sanctuary houses chimpanzees with infectious diseases, it must have a veterinarian knowledgeable in the infectious diseases and care of chimpanzees. The Facility Veterinarian is responsible for establishing and implementing a health monitoring system specifically designed to meet the health requirements of chimpanzees in the Sanctuary. The veterinarian must use appropriate professional judgment based upon current veterinary practices when dealing with the health and well-being of the chimpanzees in the Sanctuary.

(2) *Preventative medicine and animal health program.* The prevention of disease, metabolic conditions, and injury must be a priority focus of the Facility Veterinarian, managers, and caregivers staff. A quality preventative medicine and animal health program requires the participation of all employees having direct contact with the chimpanzees in the Sanctuary. The goal of this program shall be to maintain the chimpanzees in good health, taking into consideration each animal's age, medical history, experimental history, behavior patterns, prognosis for recovery, and current veterinary medical practices. It shall be the responsibility of the Facility Veterinarian to develop and implement the preventive medicine and animal health program. Other persons may perform some aspects of the program under the direction of the veterinarian. The veterinarian must provide guidance to all personnel involved in the care of chimpanzees to ensure appropriate handling, observation, treatment and oversight of surgery, post-surgical care, immobilization, sedation, analgesia, and anesthesia. Chimpanzees must receive an annual physical examination unless the Facility Veterinarian determines that a different interval is needed.

(3) *Quarantine and stabilization of newly arrived animals.* Newly received chimpanzees must be quarantined for a period for physiological, psychological, and nutritional stabilization before their introduction to the rest of the group. The stabilization period should be lengthened appropriately if the chimpanzee has a significant medical problem or if abnormal medical findings are detected during the quarantine period. If the chimpanzee has not been given a complete physical examination within six months, an examination must be conducted during the stabilization period. During this period, the following additional procedures will be performed:

(i) Tuberculin tests must be negative for two (2) consecutive tests before the chimpanzee is released from quarantine. Any chimpanzee that is suspected of harboring the TB organism, or that is diagnosed with TB will be isolated and treated until determined by the Facility Veterinarian to be of no health risk to other chimpanzees or humans. The Facility Veterinarian may recommend euthanasia in those cases that do not respond to therapy and consequently the chimpanzee experiences undue pain and suffering that cannot be alleviated. The procedures noted under § 9.6(d) must be observed if euthanasia is necessary.

(ii) Fecal samples must be checked for parasites and parasitic ova.

(iii) A complete blood count and serum chemical panel must be obtained.

(iv) Additional serum for banking and/or testing shall be obtained as appropriate by the Facility Veterinarian.

(v) If the donating facility did not test for the appropriate viruses, the Sanctuary must perform a viral panel and serology for the various chronic hepatitis viruses and HIV.

(vi) Additional tests or procedures may be required if deemed necessary by the Facility Veterinarian.

(4) *Vaccination.* Chimpanzees are susceptible to many of the vaccine-preventable diseases of human childhood. Appropriate vaccines should be considered and administered if deemed necessary to protect the chimpanzees in the Sanctuary. Measles, mumps, and rubella occur predominantly as asymptomatic diseases. Vaccination protocols should be changed with the introduction of new vaccines and with the expanding knowledge of chimpanzee disease susceptibility. Additional vaccines may be warranted under specific conditions (*e.g.*, rabies, influenza, encephalomyocarditis virus vaccine). The need for adjusting or changing the vaccines will be determined at the discretion of the Facility Veterinarian.

(5) *Parasite detection, control, and treatment.* Parasite control is an important aspect of a preventative medicine program for chimpanzees. Prophylactic de-worming must be considered and provided for newly arrived chimpanzees if deemed appropriate by the Facility Veterinarian.

(6) *Observation, diagnosis, prevention and treatment of illness and injury.* The Sanctuary must implement appropriate methods for disease surveillance and diagnosis of diseases. Upon diagnosis of disease, treatment must be initiated unless the Facility Veterinarian determines that treatment is inappropriate for medical, ethical, or humane reasons. A person trained to recognize signs of disease must observe chimpanzees for signs of illness, injury, or abnormal behavior. The Facility Veterinarian must approve all medication or therapy plans. The staff behaviorist will develop and implement plans addressing abnormal behavior in chimpanzees. Observations must be made at least once every day including holidays and weekends. More frequent observations are warranted during postoperative recovery or when chimpanzees are ill or have an injury. Professional judgment should be used to determine the adequate frequency and quality of observations. If an entire group of chimpanzees is known or believed to be exposed to an infectious agent (*e.g.*, Mycobacterium tuberculosis), the group may be kept intact during the process of diagnosis, treatment, and control. Methods of disease prevention, diagnosis, and therapy must comply with those currently accepted in veterinary medical practice. Diagnostic laboratory services facilitate veterinary medical care and can include gross and microscopic pathology, clinical pathology, hematology, microbiology, clinical chemistry, and serology. It is important that arrangements with diagnostic laboratories be established before chimpanzees arrive at the Sanctuary.

(7) *Physical and chemical restraint.* The Sanctuary should minimize the use of physical and chemical restraint. Chimpanzees in the Sanctuary should be trained to permit certain procedures with minimal or no restraint. Such procedures may include injections, dosing or other treatments, and cage-side health observations. Due to the strength of chimpanzees, consideration must always be given to the safety of the caregivers. For this reason, as well as the requirement for certain necessary interventions (*e.g.,* complete exams, treatments, tissue collections, and transfer), chemical sedation may sometimes be necessary. A qualified individual must continuously monitor recovery from chemical restraint until the chimpanzee has regained full ambulatory capability and is alert enough to move about the cage and is alert enough to avoid injury. Padding of

the enclosure may be required if there is a danger of injury (falling) while recovering from anesthesia or heavy sedation. In most instances, chimpanzees should be isolated from their cage mates during the sedation process which is to include recovery. Physical restraint should rarely be necessary in the Sanctuary. When it is necessary to use physical restraint measures, due consideration must be given to the temporary or permanent effects upon the chimpanzee and human and animal safety concerns. Chimpanzees should be physically restrained only for the time required to complete the task at hand.

(8) *Surgery and post-surgical care.* Surgery on Sanctuary chimpanzees may be required to improve their health or repair injuries. Except for emergency situations in the following paragraph, survival surgery on Sanctuary chimpanzees must be performed under aseptic conditions and in facilities that meet the requirements of the accrediting association and must be under the direction and supervision of a veterinarian qualified to perform surgery on nonhuman primates. When emergency situations require immediate surgical intervention under less than aseptic conditions, veterinary medical judgment must be employed with the best possible technique practiced. During the post-surgical recovery period, the chimpanzee must be in a clean, dry area free from objects that might cause inadvertent harm to the chimpanzee. The chimpanzee must be constantly monitored by trained personnel until fully recovered from the anesthesia and fully ambulatory. Particular attention must be given to thermoregulation, cardiovascular and respiratory function, and postoperative pain or discomfort during recovery from anesthesia. Detailed medical and surgical records must be maintained including observations, any drugs or supportive care given, and times and dosage of medications given to the chimpanzee. The records may be created and retained in electronic forms. After anesthetic recovery, monitoring may be less intense but should include attention to basic biologic functions of intake and elimination, behavioral signs of postoperative pain, monitoring for post-surgical infections and care of the surgical incision, bandaging, and timely removal of skin sutures, clips, or staples.

(9) *Analgesia.* Relief of pain is a component of adequate veterinary care that must be provided to chimpanzees in the Sanctuary. The responsibility for assuring that pain management is current and in accordance with acceptable veterinary medical practices rests with the Facility Veterinarian. Sanctuary caregivers must be properly trained to recognize when a chimpanzee is in pain, and provide the appropriate response to alleviate or report the condition to veterinarian or, in the absence of the veterinarian, to another individual capable of initiating the procedures necessary to reduce or eliminate the pain. Methods used to relieve the pain must be in accordance with current veterinary or medical practices, and documented in the chimpanzee medical or surgical records. These records will be available for review by USDA and NIH representatives. The records may be created and retained in electronic form.

(10) *Emergency, weekend, and holiday care.* Chimpanzees must be cared for by qualified personnel on a daily basis, including weekends and holidays, to safeguard their well-being. Emergency veterinary care must also be available during these times. In the event of an emergency, Sanctuary security should be able to reach someone that can adequately respond to such emergency. Notification procedures must be documented in the form of operating procedures and a list of persons to call. The list must include home and/or mobile telephone numbers. The operating procedure and phone numbers must be placed in a location that it is available to the appropriate individuals when needed. A copy of the disaster plan must also be available in a location that makes it readily available to the staff when needed.

(d) *Under what circumstances is euthanasia permitted?* As stated in section 481C(d)(2)(I) of the Public Health Service Act as added by section 2 of the CHIMP Act, none of the chimpanzees may be subjected to euthanasia except as in the best interest of the chimpanzee involved as determined by the SCCC and the Facility Veterinarian. Therefore, euthanasia for medical or humane reasons is permitted. Euthanasia may be permitted for reasons of health or quality of life of the individual chimpanzee, including for disease, in connection with trauma, complications of aging, or for other humane reasons. Methods of euthanasia must be consistent with the most recent report of the American Veterinary Medical Association Panel on Euthanasia (2002). When euthanasia is performed, the veterinarian will determine the appropriate agent and it will be administered only by properly trained personnel under the direction of the Facility Veterinarian. The decision to perform euthanasia will be made by the veterinarian in consultation with the Facility Director or Deputy Director. The SCCC will participate in the decision in non-medical emergencies. All euthanasia decisions must be reviewed by the SCCC, preferably prior to euthanasia. In emergencies, where euthanasia has to be performed immediately by the Facility Veterinarian, the circumstances and the decision by the Facility Veterinarian will be presented at the next scheduled or special meeting of the SCCC. The NCRR Project Officer must be notified of the euthanasia event within 72 hours by electronic or telephonic means. Euthanasia of individual chimpanzees may negatively affect the care staff and appropriate counseling and psychological support should be considered.

(e) *Incorporation by reference.* The Guide for the Care and Use of Laboratory Animals published by the National Research Council (Guide), 1996, International Standard Book Number 0–309–05377–3, is incorporated by reference in this section. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the publication from the National Academy Press, 2101 Constitution Avenue, NW., Lockbox 285,Washington, DC 20055; or you may order it electronically via the Internet at *http://nap.edu;* or view it online at *http://oacu.od.nih.gov/regs/guide/guidex.htm.* You may inspect a copy at NIH, NCRR, 1 Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20817–4874, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

§ 9.7 Reproduction.

Chimpanzee reproduction is prohibited in the Sanctuary. Therefore, males must be sterilized by vasectomy before acceptance into the system, or, as a temporary measure, housed apart from females until they are sterilized. Vasectomies are advisable because they are minimally invasive and because effectiveness of the vasectomy can be validated through laboratory testing of semen. Seminal collection techniques must be carefully evaluated to avoid painful stimuli. Other proven methods of birth control may be used under special conditions deemed appropriate by the Facility Veterinarian and SCCC.

The Facility Veterinarian must determine the appropriate test(s) to use to validate sterility. A veterinarian experienced in performing vasectomies in chimpanzees should perform the operation. Documentation must accompany each male accepted to the Sanctuary system attesting to the fact that the male has been vasectomized and laboratory tests confirm that semen samples are negative for sperm.

§ 9.8 Animal records.

(a) *What records must be maintained for chimpanzees in the Sanctuary and how are they managed?* (1) Contractors and Subcontractors operating the Federal chimpanzee Sanctuary system must maintain appropriate records to allow for accountability and disposition of chimpanzees under their care as required by the USDA Animal Welfare Regulations (9 CFR 2.35). The records may be created and retained in electronic form.

(2) The animal records currently required by the USDA Animal Welfare Regulations are also required for these standards. All chimpanzees must be tracked for life by a single agency with demonstrated expertise and capability in this area. Chimpanzees must be individually and permanently identifiable.

(3) Retrievable records must be maintained for a minimum of three years beyond the disposition or death of each chimpanzee in accordance with the Animal Welfare Regulations section 2.35(f). Original records or a copy must be transferred if the chimpanzee moves to a different facility. The records must include standard information, including permanent individual identification, research use(s), reproductive status (past and present), a summary or copy of the medical and behavioral history, the sire's identification number (if available), the dam's identification number, birth date, sex, and date acquired by the Sanctuary. The disposition date must also be noted, if applicable, including whether the chimpanzee died or was transferred to another site in the Federal Sanctuary system. The records may be created and retained in electronic form.

(4) The contractor and any subcontractor(s) operating the federally supported chimpanzee Sanctuary must provide special, quarterly and annual progress reports to the designated Federal officials as identified in the contract. The annual report must also contain a statement that certifies the Sanctuary is in full compliance with these Standards of Care regulations.

(b) *What are the rules governing the disposition of necropsy records?* The CHIMP Act requires that necropsy records from chimpanzees previously used in federally funded research projects be made available on a reasonable basis to investigators engaged in biomedical or behavioral research. In order to comply with this provision, the contractor for the Sanctuary system must devise a plan that will allow interested parties to contact the Sanctuary and receive necropsy records when they become available. Records may be provided free of charge but requesters may be required to pay for packaging and shipping costs. The records may be created and retained in electronic form.

§ 9.9 Facility staffing.

How many personnel are required to staff the chimpanzee Sanctuary and what qualifications and training must the staff possess?

(a) The professional, managerial, and support staff must be sufficient to support the scope and diversity of the activities and chimpanzee population of the Sanctuary. The level of staffing shall be adequate to ensure that the chimpanzees receive appropriate health care, are well cared for, and the administrative and fiscal operations are sound and in keeping with current practices required by NCRR, NIH;

(b) There must be a sufficient number of appropriately trained animal care and technical personnel to provide appropriate care to the chimpanzees at all times, including evenings, weekends and holidays. The number of animal care staff to chimpanzee ratio should be adjusted as experience is gained during the operation of the Sanctuary;

(c) Animal care personnel must be properly trained or experienced in providing care for the chimpanzees. Caregivers must have experience or be trained in the daily care of chimpanzees, including husbandry, enrichment techniques and observation for illness. Personnel must be familiar with regulations, guidelines and policies that relate to their duties, including basic emergency care. The Sanctuary must provide for formal or on-the-job training to facilitate the effective implementation of a high-quality and humane care program for the chimpanzees. The Sanctuary CEO is responsible for assuring that staff hired to care for the chimpanzees have a working knowledge of the physiological and behavioral needs of chimpanzees. A formal training program for new employees shall be developed and implemented. The Sanctuary shall develop a mechanism to document employee-training activities that include chimpanzee biology, husbandry, behavior, signs of well-being vs. illness or maladaption, zoonoses, and enrichment and socialization techniques, among other relevant subject areas. Training must be documented and available for review by regulatory, accrediting, and other agencies with a need to know;

(d) The veterinarian(s) responsible for providing veterinary medical care must be knowledgeable of nonhuman primate health care needs through training or experience and capable of providing appropriate care to the chimpanzees in the Sanctuary. Sufficient veterinarians must be available to administer the veterinary medical program;

(e) The Facility Director must be a person with experience in chimpanzee care and socialization techniques. In addition, the Director must have management and administrative experience;

(f) The Behaviorist(s) must be qualified through training and experience. The person must have formal training in one of the behavioral sciences and experience working with and observing nonhuman primates, or have developed expertise through at least four years of experience working with chimpanzees;

(g) The Biosafety Officer must have experience in developing and monitoring biohazards and dealing with biosafety issues related to captive nonhuman primates. Experience in these areas dealing specifically with chimpanzees is desirable;

(h) Animal Resource Managers or Supervisors must have experience working with nonhuman primates and demonstrate the skills and ability to supervise personnel; and

(i) The remaining support staff must possess the skills, knowledge and/or experience required to perform their duties.

§ 9.10 Occupational Health and Safety Program (OHSP) and biosafety requirements.

(a) *How are employee Occupational Health and Safety Program risks and concerns addressed?* (1) It is the responsibility of the Chief Executive Officer (CEO) of the Sanctuary to assure that an Occupational Health and Safety Program (OHSP) program is developed and implemented. The CEO or other responsible person may delegate responsibility for the monitoring activities associated with oversight and monitoring of the program. The Sanctuary must design and implement a plan that is consistent with current veterinary medical practices. A plan shall be considered adequate and

appropriate if it meets the guidelines and standards found in the Guide.

(2) An effective OHSP must be established at each federally supported chimpanzee sanctuary site. The program must be designed to protect all personnel, including visitors, from occupational and accidental exposure to known hazards associated with providing care or other services for chimpanzees. A health professional knowledgeable in occupational health as it relates to staff working with nonhuman primates must provide input for the OHSP. Employees in managerial and supervisory positions are obligated to provide sufficient training and oversight as necessary to minimize or eliminate exposure to occupational hazards. Employees providing day-to-day care shall follow the procedures established by the Sanctuary to avoid occupational health hazards and accidental exposures or injuries. An effective program is based upon several factors. These include knowing the hazards involved (risks), avoiding and controlling exposures (preventative measures), training and education, establishing rules and guidelines (standard operating procedures), consistency, record keeping and monitoring (documentation), and institutional and individual commitment and coordination. The Sanctuary OHSP must be reviewed with each employee at risk, and an acknowledgment of this review must be signed or initialed by the supervisor or training officer (or equivalent) and the employee.

(3) Qualified individuals with experience and training in OHSP must oversee the development of this program. The program may be directed and coordinated by the contractor's staff or consultants, or a combination of both. At a minimum, the program must address the following:

(i) An overview of the program and the institutional commitment to the OHSP;

(ii) OHSP training and education for employees working with or having exposure to chimpanzees;

(iii) Facility design and operation as needed to address occupational health and safety issues;

(iv) Hazard identification and risk assessment;

(v) Personal protective equipment;

(vi) Prevention and treatment procedures;

(vii) Personal hygiene;

(viii) Rules and guidelines for avoiding exposures;

(ix) Record keeping and monitoring procedures; and

(x) Monitoring overall performance of these areas.

(b) *How are biosafety concerns addressed?* (1) The chimpanzees may contract natural infections of zoonotic importance that can contaminate the environment or otherwise present biohazards to humans and other chimpanzees. Certain chemicals used in the routine sanitation of facilities and equipment can be hazardous if not properly used or disposed. Other conditions may also occur where temporary or permanent hazards are present. Appropriate operating procedures and policies must be established to address these areas. The contractor for the Sanctuary system is responsible for instituting and administering an effective biosafety program that addresses the biosafety hazards at that particular site. The program should include: identifying biohazards, outlining practices and procedures to be followed, providing personal safety equipment or protective clothing and equipment, and a description of the facility requirements for working with hazardous agents or materials. Policies and procedures must be implemented to avoid exposure to environmental and animal hazards. Biosafety must be included in the training program for all Sanctuary employees. The Sanctuary must use current accepted practices and publications prepared by the CDC, NIH, and professional societies specializing in biosafety in establishing a program. The input and guidance of personnel trained or experienced in biosafety are essential.

(2) Biosafety issues in the chimpanzee Sanctuary are likely reduced compared to those encountered in a biomedical research environment since research involving toxicity testing, or radioisotopes are prohibited at the Sanctuary. For those chimpanzees that arrive in the Sanctuary that are chronically infected with viruses, blood sampling and health assessments will be needed, but no invasive research will be allowed at the Sanctuary. The major biosafety concerns relate to chimpanzees that were exposed to experimental agents prior to arriving at the Sanctuary and that still present a hazard due to chronic infection (*e.g.*, persistent bacteremia or viremia). Complete records of both clinical and experimental agent exposure must accompany each chimpanzee sent to the Sanctuary. The donating facility must also provide recent testing, *e.g.*, serology, virus culture, histology, so that the Sanctuary staff are fully aware of the health condition of the arriving chimpanzee. The records may be created and retained in electronic form.

(c) *Incorporation by reference.* The Guide for the Care and Use of Laboratory Animals published by the National Research Council (Guide), 1996, International Standard Book Number 0–309–05377–3, is incorporated by reference in this section. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the publication from the National Academy Press, 2101 Constitution Avenue, NW., Lockbox 285, Washington, DC 20055; or you may order it electronically via the Internet at *http://www.nap.edu*; or view it online at *http://oacu.od.nih.gov/regs/guide/guidex.htm*. You may inspect a copy at NIH, NCRR, 1 Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20817–4874, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

§ 9.11 Animal transport.

(a) *What are the standards for transporting chimpanzees between other facilities and the Sanctuary?* The transportation of chimpanzees from the facility where they are housed to the Sanctuary by surface or air must be in accordance with the requirements set forth in the Animal Welfare Regulations (9 CFR part 3, subpart F) and international air transportation regulations and guidelines. Because the size of chimpanzees varies greatly, the transportation vehicle and/or primary enclosure must provide adequate space for the chimpanzee to make postural adjustments and provide adequate ventilation. Adequate ventilation is interpreted to mean the chimpanzee is able to maintain normal respiratory function and body temperature regulation. The Sanctuary Contractor must ascertain that the firm transporting the chimpanzees has the proper equipment, personnel, and experience to safely transport the chimpanzees. It is the responsibility of the donating institution in collaboration with the Sanctuary to validate this capability before releasing the chimpanzees for transport. The Sanctuary must report any undesirable problems involved with transportation to the donating institution and the transportation company. The NCRR representative will be notified telephonically and or electronically of the nature of the

incident, factors contributing to the incident, outcome, and measures taken to prevent future incidents. A record of such incident and action taken shall be available for review by representatives of the USDA and NIH. All records associated with the transportation of chimpanzees to or from the Sanctuary must be maintained for at least one year after the movement is completed in accordance with the current requirements set forth in the Animal Welfare Regulations (9 CFR 2.80).

(b) *What other transport regulations apply to the federally supported chimpanzee Sanctuary system?* (1) General requirements and regulations applicable to animal transport into and among Sanctuary sites include:

(i) The contractor will maintain contact with carrier personnel in order to ensure their compliance with proper care of chimpanzees during transit; and

(ii) The contractor must submit to the Project Officer by telephone, fax, or e-mail, the actual shipment schedule and proposed method of transport no less than 10 days prior to shipment. The Project Officer must be immediately informed of any changes or delays in this schedule in accordance with the terms of the current contract between NCRR and the Sanctuary contractor.

(2) Additional requirements and regulations applicable to ground transportation include:

(i) Transport must be provided by a USDA licensed intermediate handler; and

(ii) Transport must adhere to provisions of the Interstate Commerce Commission Authority Animal Transportation Regulations.

(3) Additional requirements and regulations applicable to air transportation include:

(i) The International Air Transport Association (IATA) Live Animal Regulations if air transportation is utilized, and

(ii) Delivery to and from the airports must be provided in an environmentally controlled truck per USDA Animal Welfare Regulations, (9 CFR part 3, subpart F).

(4) Requirements and regulations applicable to shipping units mandate that chimpanzees must be delivered in properly ventilated, escape-proof units, and each compartmentalized unit must have separate water and feed containers (9 CFR part 3, subpart F).

§ 9.12 Compliance with the Standards of Care, USDA and PHS policies and regulations.

(a) *How will compliance with the standards set forth in this part be monitored and what are the consequences of noncompliance with the standards?* The federally supported chimpanzee Sanctuary must comply with the standards of care set forth in this part and include a statement in the Annual Progress Report certifying compliance with these standards of care in accordance with the terms of the current contract between NCRR and the Sanctuary contractor. A designated representative of the Secretary will monitor compliance. The responsibility to monitor compliance with the standards is delegated to the NCRR/NIH/DHHS. The NIH/NCRR Project Officer for this contract will conduct scheduled site visits at least one time quarterly (or more often if necessary), review monthly and quarterly reports submitted to the Project and Contracts Officer, Subcontractors are subjected to the same provisions. Failure to comply with the standards set forth in this part or to correct deficiencies noted within the allowable time period could result in termination of the contract by the Federal Government (DHHS/NIH), allowing the Secretary to correct the deficiencies according to the terms and conditions outlined in the contract. The Secretary may impose additional sanctions on the contractor up to, and including, authorizing assumption or reassignment of the management of the Sanctuary contract.

(b) *To what type of outside review or inspection will the federally supported Sanctuary be subjected?* As noted in paragraph (a) of this section, the contractor for the Sanctuary will be monitored on a regularly scheduled basis by representatives of the NCRR/NIH/DHHS. The NCRR representative will use facility site visits, reports, personal contact, and any other means as appropriate to assure compliance with these standards. The contractor and subcontractors are required to obtain and maintain an Animal Welfare Assurance from NIH's Office of Laboratory Animal Welfare (OLAW) when chimpanzees are used for non-invasive studies as authorized in the CHIMP Act. involving chimpanzees. In addition, the Sanctuary must achieve accreditation by a nationally recognized animal program accrediting body (such as the AAALAC, or the AZA) within a time frame to be determined by NCRR/NIH. The federally supported Sanctuary must comply with the requirements set forth in the Animal Welfare Regulations (9 CFR parts 1 through 3).

§ 9.13 Other Federal laws, regulations, policies, and statues that apply to the Sanctuary.

(a) Animal Welfare Act (7 U.S.C. 2131–2159).

(b) Animal Welfare Regulations, 9 CFR, subchapter A, parts 1 and 2.

§ 9.14 Authority of the Secretary of Health and Human Services to amend or issue additional standards of care regulations.

The Secretary of the Department of Health and Human Services (or designated Federal agency) may amend, rescind, or promulgate new regulations if deemed necessary and appropriate to assure compliance with the CHIMP Act. Any such proposed changes must be published in the **Federal Register** for public comment for a minimum of 60 days.

[FR Doc. 05–394 Filed 1–10–05; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018—AI79

Endangered and Threatened Wildlife and Plants; Proposed Removal of the Plant *Agave arizonica* (Arizona agave) From the Federal List of Endangered and Threatened Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), under the Endangered Species Act of 1973, as amended (Act), propose to remove the plant *Agave arizonica* (Arizona agave) from the Federal List of Endangered and Threatened Plants. *Agave arizonica* was listed as endangered on June 18, 1984, due to threats of habitat modification and collection. Evidence collected subsequent to the listing indicates that plants attributed to *Agave arizonica* do not constitute a distinct species but rather are individuals that have resulted from recent and sporadic instances of hybridization between two species. Current taxonomic practice is not to recognize such groups of individuals as a species. The term ''species,'' as defined by the Act, only includes species, subspecies, and distinct population segments. Since *Agave arizonica* is not recognized as a species, it no longer qualifies for protection under the Act.

DATES: Comments on the proposed rule must be received on or before March 14, 2005 to ensure our consideration. Public hearing requests must be received by February 25, 2005.

ADDRESSES: Comments and materials concerning this proposal should be sent

to the Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021–4951. The proposal, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mima Falk, U.S. Fish and Wildlife Service, located in the Tucson suboffice, 110 South Church Ave, Suite 3450, Tucson, Arizona 85701 (telephone (520) 670–6150 ext. 225; facsimile (520) 670–6154).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this proposal be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning the taxonomic status or threats (or lack thereof) to this hybrid;

(2) The location and characteristics of any additional populations not considered in previous work that might have bearing on the current taxonomic interpretation; and

(3) Additional information concerning range, distribution, and population sizes, particularly if it would assist in the evaluation of the accuracy of the current taxonomic interpretation.

Our practice is to make comments that we receive on this rulemaking, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by Federal law. In some circumstances, we may withhold from the rulemaking record a respondent's identity, as allowable by Federal law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, including individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

We will take into consideration the comments and any additional information received, and such communications may lead to a final regulation that differs from this proposal.

Public Hearing

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register.** Such requests must be made in writing and addressed to Field Supervisor (*see* **ADDRESSES** section).

Background

Agave arizonica, a member of the agave family, was first discovered by J. H. Houzenga, M. J. Hazelett, and J. H. Weber in the New River Mountains of Arizona. Drs. H. S. Gentry and J. H. Weber described this species in the ''Cactus and Succulent Journal'' in 1970 (Gentry and Weber 1970). This perennial succulent has leaves growing from the base in a small basal rosette (*i.e.,* an arrangement of leaves radiating from a crown or center), and is approximately 20–35 centimeters (cm) (8–14 inches (in)) high and 30–40 cm (12–16 in) wide. The leaves are dark green with a reddish-brown to light gray border extending nearly to the base, approximately 13–31 cm (5–12 in) long and 2–3 cm (1 in) wide. The slender, branched flowering stalk is 2.5–4 meters (m) (8.2–13 feet (ft)) tall with urn-shaped flowers 25–32 millimeters (mm) (1 in) long (Hodgson 1999).

Agave arizonica is found on open slopes in chaparral or juniper grassland in Gila, Maricopa, and Yavapai Counties between 1,100–1,750 m (3,600–5,800 ft) in elevation. The plants are often found associated with *Juniperus* spp., mountain mahogany (*Cercocarpus montanus*), *Opuntia* spp., sotol (*Nolina microcarpa*), and banana yucca (*Yucca baccata*), among other species common to the chaparral/juniper-oak transition (Hodgson and DeLamater 1988). There are estimated to be fewer than 100 plants in the wild, occurring mainly on the Tonto National Forest and a few locations on private property. *Agave arizonica* plants are associated with soils that are shallow, cobbled, and gravelly, on strongly sloping to very steep slopes and rock outcrops on mid-elevation hills and mountains. The soils are well-drained and derived from a variety of rocks, including granite, gneiss, rhyolite, andesite, ruffs, limestone, sandstone, and basalt (Hodgson and DeLamater 1988). Plants typically flower in May–July.

Field studies on *Agave arizonica* began in 1983. A natural distribution study was not finalized until August 1984 (DeLamater 1984), after the final listing rule (49 FR 21055, May 18, 1984) was published. Surveys for this study were conducted in the New River Mountains, and by 1984, ten new clones (vegetative offsets, or buds, from an individual plant) were found in these mountains. These were individual clones of 2–5 rosettes. All of the clones occurred together with two other agaves, *Agave toumeyana* ssp. *bella* and *A. chrysantha. A. chrysantha* is found in southern and eastern Yavapai Counties, through much of Gila and Maricopa Counties, northern and eastern Pinal County, and northeastern Pima County. *Agave toumeyana* ssp. *bella* is restricted to the eastern slope of the Bradshaw Mountains, eastern Yavapai to northwestern and central to southern Gila County, northeastern Maricopa to northern Pinal County. Neither species is considered rare. A comparison of plant characters showed *Agave arizonica* to be intermediate to the other two agave species with which it is always found in association (DeLamater and Hodgson 1986). Pinkava and Baker (1985) suggested that plants recognized as *Agave arizonica* may be the result of continuing production of hybrid individuals rather than a species of hybrid origin based on their occurrence only where the ranges of the putative parents overlap; they are found only in random, widely scattered locations of individual plants and clones; their putative parents have overlapping flowering periods; *Agave arizonica*'s morphological characters are intermediate between the putative parents; and they appeared to be subfertile (reduced fertilization), producing pollen with a low percent of stainability, or viability. *Agave arizonica* has a chromosome count (2*n*) of 60, as does both its parents, indicating that gross chromosomal barriers to backcrossing with the putative parents are lacking. Polyploidy (having more than two complete sets of homologous chromosomes) is one factor in determining if a hybrid between two species can become genetically stable. That condition is not present in the genetic constitution of *Agave arizonica.*

Additional surveys were conducted in areas that supported sympatric populations (occurring together) of the putative parents. This resulted in the discovery of two clones in the Sierra Ancha Mountains, 100 miles disjunct from the New River Mountain locations. To date, plants and clones are known from three areas on the Tonto National

Forest (New River Mountains, Sierra Ancha Mountains, and the Humboldt Mountains). These three areas are widely separated from each other. The New River population is the most numerous, located 17.94 kilometers (km) (10.7 miles (mi)) west-northwest of the Sierra Ancha population. The Sierra Ancha population is comprised of one individual (Trabold 2001). There is another hybrid from the Payson area in the Humboldt Mountains. This agave is produced from a cross between *A. toumeyana* ssp. *toumeyana* X *A. chrysantha* that is sometimes incorrectly referred to as Arizona agave (Pinkava and Baker 1985). That individual is a triploid (3n=90), and therefore has a different chromosome count than *Agave arizonica.*

The Desert Botanical Garden (DBG), in Phoenix, initiated ecological studies of *Agave arizonica* in the mid-1980s through 1994. They conducted numerous surveys on the Tonto National Forest, collected seeds *in situ* (outside of confinement), conducted experimental crosses *in situ* and *ex situ* (in an artificial environment), and started an *ex situ* collection. DBG's work has shown that *Agave arizonica* can produce viable seed. In 1985, three different crosses were performed on clone #52, *in situ,* using flowers from different panicles (flower stalks). One cross used frozen pollen collected from *Agave arizonica* at the DBG, the second cross was self-fertilization of clone #52, and the third cross was uncontrolled outcrossing of clone #52 (flowers were left open to be pollinated by various donors). Seed was collected from all three crosses. Cross #1 produced 250 seeds, cross #2 produced 20 seeds, and cross #3 produced a large quantity of seeds (Hodgson and DeLamater 1988). Cross #2 produced poor seed set from self-fertilization, while outcrossing with *Agave arizonica* pollen produced a high proportion of viable seed, as did uncontrolled outcrossing. The majority of the seeds were planted. Ten months after planting, 10 of the 105 seeds produced from cross #1 germinated. Some of those resembled *Agave arizonica,* while others did not (W. Hodgson, Desert Botanical Garden, pers. comm. 2003). DBG also conducted controlled crosses of *A. chrysantha* and *A. toumeyana* ssp. *bella.* The seeds produced from this cross resulted in *Agave arizonica* plants. Individual *Agave arizonica* plants can therefore be created by crosses of the parental species. This condition indicates that there is nothing genetically unique about *Agave arizonica.* If all of the *Agave arizonica* individuals that exist in the field were destroyed, it is unlikely that any unique genetic material would be lost (M. Baker, Southwest Botanical Research, pers. comm. 2004). These results support the hypothesis that *Agave arizonica* is composed of individuals that resulted from recent and spontaneous instances of hybridization between two species, and is not, at this time, a species of hybrid origin.

Agave arizonica is most likely a first-generation (F1) hybrid between two other species. It is not known if any individuals of the F1 generation, *in situ,* have backcrossed with either one of the parents or with another *Agave arizonica* individual. The latter seems unlikely because of the distance pollen would have to travel given the low numbers of individuals and the great distance separating them. Seeds have been produced in the wild, but it is not known if those seeds were produced from *Agave arizonica* X either parent or *Agave arizonica* X *Agave arizonica.* Seeds grown out in greenhouse conditions produced plants with wide phenotypic (visible) variations; not all seedlings represented ''pure'' Agave arizonica traits. The fact that Agave arizonica can be reliably produced by crossing the putative parents *ex situ* lends support to the hypothesis that *Agave arizonica* is a recurring F1 hybrid. All evidence supports that *Agave arizonica* individuals are derived from crosses between different species. In other words, each individual *Agave arizonica* was created spontaneously and independently from separate crossings of the putative parental species (M. Baker, pers. comm. 2004).

Agave arizonica plants are rare in the wild. The likelihood is low that two of these plants would breed with one another because it is not likely that two such plants would be close enough to one another and bloom in the same year. Plants of a clone may produce flowers in synchrony, but spatially separated clones may not all bloom at the same time. The flowering period of *Agave arizonica* overlaps with that of its putative parents, and the same insects (bumblebees, mining bees of the family Halictidae, and solitary bees) visit all three agave species. This condition can lead to back-crosses with one of the putative parents. Whether *Agave arizonica* can maintain a separate genetic identity is not likely, due to low numbers, overlap of flowering period with the putative parents, and lack of an effective reproductive isolating mechanism to promote genetic stability.

In 1999, Hodgson published a treatment for the Agave family for the ''Flora of Arizona'' (Hodgson 1999). *Agave arizonica* was not recognized as a species in that treatment, which indicated that it should be referred to as *Agave* X *arizonica,* a hybrid of recent origin involving *A. chrysantha* X *A. toumeyana* var. *bella.*

Jolly (in Riesberg 1991) has suggested protection for a hybrid taxon if (1) Its evolution has gone past the point where it can be reproduced through crossing of its putative parents, (2) it is taxonomically distinct from its parents, and (3) it is sufficiently rare or imperiled. Under these criteria, F1 hybrids such as *Agave arizonica* should receive no protection.

In summary, the plant species formerly referred to as *Agave arizonica* is now recognized as an interspecific hybrid produced sporadically and spontaneously by the cross of *Agave chrysantha* X *Agave toumeyana* var. *bella.* Individuals have been determined to be a hybrid for the following reasons: (1) They share the same chromosome number (2n=60) with the putative parents, indicating that there are no genetic barriers in place to facilitate genetic stability, (2) flowering periods of the putative parents overlap, (3) morphological characters of *Agave arizonica* are intermediate with those of the putative parents, (4) *Agave arizonica* only occurs where there is overlap with the putative parents, (5) it appears to be subfertile, producing pollen with low percent stainability (pollen viability is correlated with the ability of pollen to absorb certain chemical stains; low percent stainability is correlated with reduced pollen viability), (6) *Agave arizonica* can be created, *ex situ*, by crossing the putative parents, indicating that there may be no unique genetic characters associated with these plants, and (7) it has not, to anyone's knowledge, reproduced itself sexually in the field.

Previous Federal Action

Federal Government action concerning *Agave arizonica* began with section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. This report (House Document No. 94–51), which included *Agave arizonica*, was presented to Congress on January 9, 1975, and accepted by the Service under section 4(c)(2), now section 4(b)(3)(A), of the Act as a petition to list these species. The report, along with a statement of our intention to review the status of the plant taxa, was published in the **Federal Register** on July 1, 1975 (40 FR 27823). On June 16, 1976, we published a proposed rule in the

Federal Register (41 FR 24523) to determine approximately 1,700 vascular plants to be endangered pursuant to section 4 of the Act. *Agave arizonica* was included in this proposal. On December 10, 1979, we withdrew all outstanding proposals not finalized within two years of their first publication, as required by the 1978 amendments to the Act. On August 26, 1980, the Service received a status report prepared by four researchers employed by the Museum of Northern Arizona. This report documented the status of, and threats to, the species. On December 5, 1980, we published a revised notice for plants (45 FR 82479) and included *Agave arizonica* in category 1. Category 1 comprised taxa for which we had sufficient biological information to support their being listed as endangered or threatened species. We published a proposed rule to list *Agave arizonica* as an endangered species on May 20, 1983 (48 FR 22757). No critical habitat was proposed. We received a total of 13 written comments on the proposal. No public hearing was requested or held. The final rule listing *Agave arizonica* as endangered was published on May 18, 1984 (49 FR 21055), and concurrent with the proposal, no critical habitat was designated.

In 1985, a year after *Agave arizonica* was listed, the USDA Forest Service (FS) petitioned us to delist *Agave arizonica* because of its hybrid status. We sent out the work on *Agave arizonica* that had been published for peer review and solicited comments. Many of the comments supported delisting based on the available evidence; however, the Service disagreed that the available data conclusively proved that *Agave arizonica* was a hybrid. The Service believed that the results of the controlled crosses were important for the analysis, and those had not been completed at the time of the review. Therefore, on January 21, 1987 (52 FR 2239), we announced that delisting was not warranted.

Delisting Analysis

After a review of all information available, we are proposing to remove *Agave arizonica* from the List of Endangered and Threatened Plants, 50 CFR 17.12. Section 4(a)(1) of the Act and regulations (50 CFR part 424) issued to implement the listing provisions of the Act set forth the procedures for adding species to or removing them from Federal lists. The regulations at 50 CFR 424.11(d) state that a species may be delisted if (1) it becomes extinct, (2) it recovers, or (3) the original classification data were in error. Since the time of listing, additional study has shown that *Agave arizonica* is not a distinct species, but consists of individuals that are the result of spontaneous, occasional, and continuing hybridization between two distinct species. In modern taxonomic practice, such groups of individuals are not recognized as species. We have concluded that the original taxonomic interpretation upon which the listing decision was based has not been substantiated by subsequent studies, and *Agave arizonica* does not qualify for protection because it does not fit the definition of a species in the Act.

Our determination that *Agave arizonica* should be proposed for delisting is based on evidence that it is not a species and, therefore, does not qualify for protection under the Act, rather than on the control of threats. The term ''species,'' as defined in the Act, includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature. *Agave arizonica* does not meet this definition because it is not known to interbreed *in situ* or otherwise reproduce itself. Hybrid origin of species is considered common within the flowering plants (Grant 1963). Species of hybrid origin are capable of reproducing themselves and maintaining a degree of genetic stability. Scientific evidence at this point supports the determination that *Agave arizonica* does not have these characteristics of a species. The plants are not known to have sexually reproduced *in situ*. *Agave arizonica* plants have sporadically developed *in situ* from the putative parents, but they have not been reproductively self-sustaining. *Agave arizonica* has never been found in well-developed populations or outside patches of its putative parents.

We have carefully assessed the best scientific and commercial information available regarding the conclusion that *Agave arizonica* is a hybrid that does not qualify for protection under the Act. Based on this evaluation, the preferred action is to remove *Agave arizonica* from the List of Endangered and Threatened Plants, 50 CFR 17.12.

Effects of the Proposed Rule

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply to *Agave arizonica*. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce *Agave arizonica* to possession from areas under Federal jurisdiction. For plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. If *Agave arizonica* is removed from the List of Endangered and Threatened Plants, these prohibitions would no longer apply.

If *Agave arizonica* is delisted, the requirements under section 7 of the Act would no longer apply. Federal agencies would not be required to consult with us on their actions that may affect *Agave arizonica*.

If delisted, *Agave arizonica* would continue to receive limited protection under Arizona's Native Plant Law, A.R.S., Chapter 7, Section 3–901, which specifically prohibits collection except for scientific or educational purposes under permit.

The 1988 amendments to the Act require that all species delisted due to recovery be monitored for at least five years following delisting. *Agave arizonica* is being proposed for delisting because the taxonomic interpretation that it is a species is no longer believed to be correct; *Agave arizonica* is a sporadically occurring hybrid, rather than a distinct taxon. Therefore, no monitoring period following delisting would be required.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our delisting decision is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed delisting.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final

decision may differ from this proposed rule.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand including answers to questions such as the following: (1) Are the requirements in the document clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION**; section of the preamble helpful in understanding the document? (5) What else could we do to make the proposed rule easier to understand? Send a copy of any written comments about how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240.

National Environmental Policy Act

We have determined that an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 1320 implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The OMB regulations at 5 CFR 1320.3(c) define a collection of information as the obtaining of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, 10 or more persons. Furthermore, 5 CFR 1320.3(c)(4) specifies that ''ten or more persons'' refers to the persons to whom a collection of information is addressed by the agency within any 12-month period. For purposes of this definition, employees of the Federal Government are not included. The Service may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

This rule does not include any collections of information that require approval by OMB under the Paperwork Reduction Act. The *Agave arizonica* is being proposed for delisting because the taxonomic interpretation that it is a species is no longer believed to be correct; *Agave arizonica* is a sporadically occurring hybrid, rather than a distinct taxon. Therefore, no monitoring period following delisting would be required and so we do not anticipate a need to request data or other information from 10 or more persons during any 12-month period to satisfy monitoring information needs. If it becomes necessary to collect information from 10 or more non-Federal individuals, groups, or organizations per year, we will first obtain information collection approval from OMB.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this proposed rule is not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

References Cited

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Authors

The primary authors of this document are staff located at the Ecological Services Tucson Sub-office (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we hereby propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

§ 17.12 [Amended]

2. Amend § 17.12(h) by removing the entry ''*Agave arizonica*'' under ''FLOWERING PLANTS'' from the List of Endangered and Threatened Plants.

Dated: December 7, 2004.

Marshall Jones,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 05–442 Filed 1–10–05; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 70, No. 7
Tuesday, January 11, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Boulder Project; Chequamegon-Nicolet National Forest, Oconto and Langlade Counties, Wisconsin

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement (EIS) to document the analysis and disclose the environmental impacts of proposed land management activities, and corresponding alternatives, within the Boulder Project area.

The purpose of the Boulder Project is to implement land management activities that are consistent with direction in the Chequamegon-Nicolet National Forest Land and Resource Management Plan (Forest Plan) and respond to specific needs identified in the project area. The project-specific needs include: addressing forest age and density, stand tending and reforestation, road closures, and wildlife habitat maintenance and improvement.

The Boulder Project area is located primarily on National Forest System lands, administered by the Lakewood/Laona Ranger District, north of Lakewood, Wisconsin. The legal description for the project area is: Township 31 North, Range 14 East, sections 1 and 12; Township 31 North, Range 15 East, sections 1–36; Fourth Principal Meridian.

DATES: Comments concerning the proposed land management activities should be received within 30 days following publication of this notice to receive timely consideration in the preparation of the draft EIS.

ADDRESSES: Send written comments concerning the proposed land management activities or requests to be placed on the project mailing list to: Anne Archie, c/o Paul Sweeney, NEPA Coordinator; Attention: Boulder Project, Lakewood/Laona Ranger District, 15085 State Rd. 32, Lakewood, Wisconsin 54138. You are welcome and encouraged to submit electronic comments in acceptable formats [plain text (.txt), rich text (.rtf) or Word (.doc)] to: *comments-eastern-chequamegon-nicolet-lakewood@fs.fed.us*.

FOR FURTHER INFORMATION CONTACT: Paul Sweeney, Project Leader/NEPA Coordinator, Lakewood/Laona Ranger District, 15085 State Rd. 32, Lakewood, Wisconsin 54138, phone (715) 276–6333, e-mail: *pfsweeney@fs.fed.us*.

SUPPLEMENTARY INFORMATION: The information presented in this notice is included to help the reviewer determine if they are interested in or potentially affected by the proposed land management activities. The information presented in this notice is summarized. Those who wish to provide comments, or are otherwise interested in or affected by the project, are encouraged to obtain additional information from the contact identified in the **FOR FURTHER INFORMATION CONTACT** section.

Proposed Actions—The proposed land management activities (proposed actions) include the following, with approximate acreage and mileage values: (1) Forest age and density—selection harvest 1747 acres, thin 2835 acres, clearcut harvest 489 acres, overstory removal harvest 79 acres, shelterwood harvest 382 acres (other actions needed include 1.7 miles of road construction and 14.7 miles of road reconstruction); (2) stand tending and reforestation—hand release 1589 acres of young plantations, prescribe burn 26 acres, plant 1338 acres of white pine and eastern hemlock in the understories of existing stands, plant fully on 54 acres, mechanically scarify 259 acres for natural regeneration, and fence 29 acres to protect hemlock; (3) road closures—close 1.4 miles of roads currently open, and decommission from the Forest's classified road system 32.5 miles of roads; (4) wildlife habitat maintenance and improvement—hand release 99 acres of wildlife openings using brush cutters, and plant fruit-bearing shrubs on 20 acres.

Responsible Official—The Forest Supervisor of the Chequamegon-Nicolet National Forest, Anne Archie, is the Responsible Official for making project-level decisions from the project.

Decision Space—Decisionmaking will be limited to specific activities relating to the proposed actions. The primary decision to be made will be whether or not to implement the proposed actions or another action alternative that responds to the project's purpose and needs.

Project History—In 2004, the Forest Service was developing a proposal for the Boulder Opportunity Area. In January of 2005, the Boulder Project is being presented to the public for comment (scoping) prior to undertaking preparation of an Environmental Assessment. Years of experience have shown that the effects of implementing similar activities in the area are not significant. We therefore do not feel that an EIS is required. However, due to the increase in appeals and litigation and for wise fiscal efficiency, an EIS will be prepared for the Boulder Project.

Preliminary Issues—Comments from American Indian tribes, the public, and other agencies will be considered in identifying preliminary issues. Issues raised in similar projects have included: Effects to threatened, endangered, and sensitive species; effects to management indicator species; effects from road construction and road closures; effects to motorized recreational access.

Public Participation—The Forest Service is seeking comments from Federal, State, and local agencies, as well as local Native American tribes and other individuals or organizations that may be interested in or affected by the proposed actions. Comments received in response to this notice will become a matter of public record. While public participation is welcome at any time, comments on the proposed actions received within 30 days of this notice will be especially useful in the preparation of the draft EIS. Timely comments will be used to identify: Potential issues with the proposed actions, alternatives to the proposed actions that respond to the identified needs and significant issues, and potential environmental effects of the proposed actions and alternatives considered in detail. In addition, the public is encouraged to contact and/or visit Forest Service officials at any time during the planning process.

The decisions associated with the analysis of this project will be consistent with the Chequamegon-Nicolet Forest Plan.

Estimated Dates for Filing—The draft EIS is expected to be filed with the Environmental Protection Agency and available for public review in December 2005. A 45-day comment period will follow publication of a Notice of Availability of the draft EIS in the **Federal Register**. Comments received on the draft EIS will be used in preparation of the final EIS, expected in April 2006. A Record of Decision (ROD) will also be issued at that time along with the publication of a Notice of Availability of the final EIS and ROD in the **Federal Register**.

Reviewer's Obligation to Comment—The Forest Service believes it is important at this early stage to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of the draft EIS must structure their participation in the environmental review of the proposal in such a way that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 513 (1978). Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir, 1986), and *Wisconsin Heritages Inc.* v. *Harris*, 490 F.Supp. 1334, 1338 (E.D. Wis., 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period of the draft EIS in order that substantive comments and objections are available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS. To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments should be as specific as possible. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Dated: January 5, 2005.

Anne Archie,

Forest Supervisor, Chequamegon-Nicolet National Forest.

[FR Doc. 05–482 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Trinity County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Trinity County Resource Advisory Committee (RAC) will meet at the Trinity County Office of Education in Weaverville, California, January 31, 2005. The purpose of this meeting is to discuss committee direction as it pertains to title II of the Secure Rural Schools and Community Self-Determination Act of 2000.

DATES: January 31, 2005.

ADDRESSES: The meetings will be held at the Trinity County Office of Education, 201 Memorial Drive, Weaverville, California 96093.

FOR FURTHER INFORMATION CONTACT: Michael R. Odle, Assistant Public Affairs Officer and RAC Coordinator.

SUPPLEMENTARY INFORMATION: The meetings are open to the public. Public input sessions will be provided and individuals will have the opportunity to address the Trinity County Resource Advisory Committee.

Dated: January 5, 2005.

J. Sharon Heywood,

Forest Supervisor.

[FR Doc. 05–487 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Revision of List of Agents To Accept Legal Process

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of change to list of agents and/or contact information designated to accept legal process.

SUMMARY: This document revises the list of agents designated to accept legal process found in the Code of Federal Regulations (CFR) part 581, appendix A.

Human Resources Manager, Natural Resources Conservation Service, Human Resources Services Team, PO Box 2890, Room 5212—South Bldg., Washington, DC 20013–2890, (202) 720–4264.

Human Resources Manager, Natural Resources Conservation Service, Human Resources Services Team, 501 W. Felix Street, FWFC, Bldg. 23, PO Box 6567, Ft. Worth, TX 76115, (817) 504–3504.

Human Resources Manager, Natural Resources Conservation Service, 3381 Skyway Drive, PO Box 311, Auburn, AL 36830, (334) 887–4543.

Human Resources Manager, Natural Resources Conservation Service, 800 West Evergreen, Atrium Bldg., Suite 100, Palmer, AK 99645–6539, (907) 761–7743.

Human Resources Manager, Natural Resources Conservation Service, U.S. Courthouse—Federal Bldg., 230 N. First Avenue, Suite 509, Phoenix, AZ 85003–1706, (602) 280–8800.

Human Resources Manager, Natural Resources Conservation Service, Federal Bldg., Room 3416, 700 West Capitol Avenue, Little Rock, AR 72201–3228, (501) 301–3136.

Human Resources Manager, Natural Resources Conservation Service, 430 G Street, Suite 4164, Davis, CA 95616–4164, (530) 792–5691.

Human Resources Manager, Natural Resources Conservation Service, 655 Parfet Street, Room E200C, Lakewood, CO 80215–5517, (720) 544–2823.

Human Resources Manager, Natural Resources Conservation Service, 344 Merrow Road, Tolland, CT 06084–3917, (860) 871–4011.

Human Resources Manager, Natural Resources Conservation Service, 1203 College Park Drive, Suite 101, Dover, DE 19904–8713, (302) 678–4173.

Human Resources Manager, Natural Resources Conservation Service, 2614 NW. 43rd Street, Gainesville, FL 32606–6611, (352) 338–9526.

Human Resources Manager, Natural Resources Conservation Service, 355 E. Hancock Avenue, Stop Number 200, Athens, GA 30601, (706) 546–2118.

Administrative Officer, Natural Resources Conservation Service, FHB Bldg., Suite 301, 400 Route 8, Mongmong, GU 96910–2003, (671) 472–7165.

Human Resources Manager, Natural Resources Conservation Service, 300 Ala Moana Blvd., Room 4118, Honolulu, HI 96850–4118, (808) 541–2600, ext. 150.

Human Resources Manager, Natural Resources Conservation Service, 693 Federal Bldg., 210 Walnut, Suite 693, Des Moines, IA 50309, (515) 284–4587.

Human Resources Manager, Natural Resources Conservation Service, 9173 West Barnes Drive, Suite C, Boise, ID 83709–1574, (208) 378–5712.

Human Resources Manager, Natural Resources Conservation Service, 2118 W. Park Court, Champaign, IL 61821, (217) 353–6619.

Human Resources Manager, Natural Resources Conservation Service, 6013 Lakeside, Blvd., Indianapolis, IN 46278–2933, (317) 290–3200, ext. 333.

Human Resources Manager, Natural Resources Conservation Service, 760 S.

Broadway, Salina, KS 67401, (785) 823–4522.

Human Resources Manager, Natural Resources Conservation Service, 771 Corporate Drive, Suite 210, Lexington, KY 40503, (859) 224–7401.

Human Resources Manager, Natural Resources Conservation Service, 3737 Government Street, Alexandria, LA 71303, (318) 473–7769.

Human Resources Manager, Natural Resources Conservation Service, 451 West Street, Amherst, MA 01002–2955, (413) 253–4353.

Human Resources Manager, Natural Resources Conservation Service, John Hanson Business Center, 339 Busch's Frontage Road, Suite 301, Annapolis, MD 21401, (410) 757–2926.

Human Resources Manager, Natural Resources Conservation Service, 967 Illinois Avenue, Suite #3, Bangor, ME 04401, (207) 990–9100, ext. 501.

Human Resources Manager, Natural Resources Conservation Service, 3001 Coolidge Road, Suite 250, East Lansing, MI 48823, (517) 324–5134.

Human Resources Manager, Natural Resources Conservation Service, 375 Jackson Street, Suite 600, St. Paul, MN 55101, (651) 602–7855.

Human Resources Manager, Natural Resources Conservation Service, Suite 1321, Federal Bldg., 100 West Capitol Street, Jackson, MS 39269–1399, (601) 965–4549.

Human Resources Manager, Natural Resources Conservation Service, Parkade Center, Suite 250, Business Loop 70 West, Columbia, MO 65203–2536, (573) 876–0904.

Human Resources Manager, Natural Resources Conservation Service, Federal Bldg., Room 443, 10 East Babcock Street, Bozeman, MT 59715–4704, (406) 587–6937.

Human Resources Manager, Natural Resources Conservation Service, 4405 Bland Road, Suite 205, Raleigh, NC 27609–6293, (919) 873–2108.

Human Resources Manager, Natural Resources Conservation Service, 220 E. Rosser Avenue, Room 278, P.O. Box 1458, Bismarck, ND 58502–1458, (701) 530–2008.

Human Resources Manager, Natural Resources Conservation Service, Federal Bldg., Room 152, 100 Centennial Mall North, Lincoln, NE 68508–3866, (402) 437–4057.

Human Resources Manager, Natural Resources Conservation Service, Federal Bldg., 2 Madbury Road, Durham, NH 03824–2043, (603) 868–7581.

Human Resources Manager, Natural Resources Conservation Service, 220 Davidson Avenue, 4th Floor, Somerset, NJ 08873, (732) 537–6081.

Human Resources Manager, Natural Resources Conservation Service, 6200 Jefferson Street, NE., Suite 305, Albuquerque, NM 87109–3734, (505) 761–4409.

Human Resources Manager, Natural Resources Conservation Service, 5301 Longley Lane, Bldg. F, Suite 201, Reno, NV 89511–1805, (775) 784–5868. ext.172.

Human Resources Manager, Natural Resources Conservation Service, 441 South Salina Street, Suite 354, Room 520, Syracuse, NY 13202–2450, (315) 477–6512.

Human Resources Manager, Natural Resources Conservation Service, 200 North High Street, Room 522, Columbus, OH 43215–2478, (614) 255–2509.

Human Resources Manager, Natural Resources Conservation Service, 100 USDA, Suite 206, Stillwater, OK 74074–2655, (405) 742–1209.

Human Resources Manager, Natural Resources Conservation Service, 101 SW Main Street, Suite 1300, Portland, OR 97204–3221, (503) 414–3223.

Human Resources Manager, Natural Resources Conservation Service, 1 Credit Union Place, Suite 340, Harrisburg, PA 17110–2993, (717) 237–2229.

Human Resources Manager, Natural Resources Conservation Service, IBM Bldg., Suite 604, 654 Munoz Rivera Avenue, Hato Rey, PR 00918–4123 (787) 766–5206, ext. 228.

Human Resources Manager, Natural Resources Conservation Service, 60 Quaker Lane, Suite 46, Warwick, RI 02886–0111, (401) 828–1300.

Human Resources Manager, Natural Resources Conservation Service, Strom Thurmond Federal Bldg., 1835 Assembly Street, Room 950, Columbia, SC 29201–2489, (803) 253–3920.

Human Resources Manager, Natural Resources Conservation Service, Federal Bldg., 200 Fourth Street SW., Huron, SD 57350–2475, (605) 352–1224.

Human Resources Manager, Natural Resources Conservation Service, 675 U.S. Courthouse, 801 Broadway, Nashville, TN 37203–3878, (615) 277–2541.

Human Resources Manager, Natural Resources Conservation Service, W.R. Poage Federal Bldg., 101 South Main Street, Temple, TX 76501–7602, (254) 742–9931.

Human Resources Manager, Natural Resources Conservation Service, W.F. Bennett Federal Bldg., 125 South State Street, Room 4402, Salt Lake City, UT 84138–1100, (801) 524–4576.

Human Resources Manager, Natural Resources Conservation Service, 356 Mountain View Drive, Suite 105, Colchester, VT 05446, (802) 951–6796.

Human Resources Manager, Natural Resources Conservation Service, Culpeper Bldg., Suite 209, 1606 Santa Rosa Road, Richmond, VA 23229–5014, (804) 287–1666.

Human Resources Manager, Natural Resources Conservation Service, Rock Point Tower II, W. 316 Boone Avenue, Suite 450, Spokane, WA 99201–2348, (509) 323–2931.

Human Resources Manager, Natural Resources Conservation Service, 75 High Street, Room 301, Morgantown, WV 26505, (304) 284–7599.

Human Resources Manager, Natural Resources Conservation Service, 8030 Excelsior Drive, Suite 200, Madison, WI 53717, (608) 662–4430.

Human Resources Manager, Natural Resources Conservation Service, P.O. Box 33124, Casper, WY 82602, (307) 233–6794.

DATES: *Effective Date:* January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Shelli Moore, Human Resources Specialist, (605) 352–1287.

Karen W. Karlinchak,

Director, Human Resources Management Division.

[FR Doc. 05–512 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Availability of Finding of No Significant Impact for the Conservation Security Program

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice.

SUMMARY: The Natural Resources Conservation Service (NRCS) has prepared a Finding of No Significant Impact (FONSI) and an Environmental Assessment (EA) consistent with the National Environmental Policy Act (NEPA) of 1969, as amended, to implement the Conservation Security Program, which is authorized by title XII, chapter 2, subchapter A, of the Food Security Act of 1985, as amended by the Farm Security and Rural Investment Act of 2002. Upon review of the analysis of potential environmental impacts from a national perspective, the Chief of NRCS found that the program would not result in a significant impact on the quality of the human environment, particularly when focusing on the significant adverse impacts that NEPA is intended to help decisionmakers avoid and mitigate against. Therefore, a FONSI was issued, and no environmental

impact statement is required for national implementation of the program.

DATES: To ensure consideration, comments on the EA and FONSI must be postmarked on or before February 10, 2005.

ADDRESSES: Comments must be sent to the Director of the Financial Assistance Programs Division, NRCS, U.S. Department of Agriculture, P.O. Box 2890, Room 5241–S, Washington, DC 20013–2890.

FOR FURTHER INFORMATION CONTACT: Copies of the FONSI, the Final EA, or additional information on matters related to this **Federal Register** Notice can be obtained by contacting one of the following individuals at the addresses and telephone numbers shown below:

Mr. Craig Derickson, Conservation Security Program Branch Chief, Financial Assistance Programs Division, NRCS, U.S. Department of Agriculture, P.O. Box 2890, Room 5233–S, Washington, DC 20013–2890, Telephone: (202) 720–3524.

Ms. Andrée DuVarney, National Environmental Specialist, Ecological Sciences Division, NRCS, U.S. Department of Agriculture, P.O. Box 2890, Room 6158–S, Washington, DC 20013–2890, Telephone: (202) 720–4925.

SUPPLEMENTARY INFORMATION:

Description of the Proposed Action

The Conservation Security Program (CSP) is a voluntary program providing both technical and financial assistance to producers of agricultural operations for the conservation and improvement of the quality of soil, water, air, energy, plant and animal life on working lands. The intent of the program is to recognize producers financially for the significant environmental goods and services they provide to the public through their annual and ongoing conservation stewardship efforts, to motivate other agricultural producers to do the same, and to secure the Nations ability to produce food and fiber. The need to which NRCS is responding by proposing action is the need to implement CSP in a manner that achieves the purposes for which Congress authorized it, including providing payments to producers who practice good conservation stewardship on their agriculture operations, providing payments to producers to maintain conservation practices they have implemented, to provide financial assistance to producers to implement new conservation practices, and to provide payments to producers as incentives to enhance their conservation achievements. Participation in the CSP requires that a Conservation Security Program Plan be developed which includes an inventory of the agricultural operation to identify existing resource concerns and benchmark conditions of the land as well as determining the extent of existing conservation treatment. Annual payments made under CSP contracts may include a stewardship payment for existing conservation treatments, cost-share and maintenance payments, and an enhancement payment for exceptional conservation effort. A three tiered approach is used to determine the level and limitations of all payments.

The Chief of NRCS has authority under CSP to assist producers who participate in the CSP to develop a comprehensive, long term strategy for improving and maintaining all natural resources of the producer's agricultural operation. All participants must meet the highly erodible land and wetland conservation provisions of the Food Security Act of 1985, as amended.

The CSP authorizes activities that reward agricultural producers for actions they have already taken to improve the quality and quantity of natural resources, and to implement new conservation measures that will also do so. NRCS has in the past and will continue to document the results of an environmental evaluation on a site-specific level consistent with NRCS policy and, as stated in the Environmental Assessment, will consult with the appropriate organizations to avoid, reduce or mitigate adverse impacts on protected resources. NRCS will comply with requirements protecting unique geographic features and other resources, as well as NRCS policies protecting natural and cultural resources. Thus, any adverse effects that may result from this program will occur at a much lower threshold than the Environmental Impact Statement threshold. Because the purpose of the program is to improve the quality of natural resources and because of the steps NRCS will take to work with other agencies as necessary on a site-specific basis to avoid, mitigate and reduce any potential collateral adverse effects, there is no threat of a violation of any Federal, State or local law or other requirements for the protection of the environment resulting from the proposed rule to implement the CSP. There is no impact on public health or safety identified in this EA or otherwise expected.

Implementation of the CSP rule is not sufficiently related to other actions that either individually or cumulatively is likely to result in the type of significant impacts that NEPA is intended to address. Based on the information in the EA for the CSP, the Chief of the NRCS finds that the proposed actions are not a major Federal action significantly affecting the quality of the human environment that requires preparation of an EIS.

Copies of the EA and FONSI may be reviewed at the following location: Financial Assistance Programs Division, NRCS, U.S. Department of Agriculture, Room 5241–S, Washington, DC 20013–2890. The documents may also be accessed on the Internet, at *http://www.nrcs.usda.gov/programs/Env_Assess/CSP/CSP.html.*

Signed in Washington, DC, on December 20, 2004.

Bruce I. Knight,

Chief, Natural Resources Conservation Service.

[FR Doc. 05–510 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Lower Payette River Ditch Diversion, Replacement Payette County, ID

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of availability of Draft Environmental Assessment for review and comment.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR part 1500); and the Natural Resources Conservation Service Guidelines (7 CFR part 650); the Natural Resources Conservation Service, U.S. Department of Agriculture, gives notice that a draft environmental assessment has been prepared for a federally assisted proposed project by the Lower Payette Ditch Company, Payette County, Idaho.

DATES: Comments will be received for a 45 day period commencing with this date of publication.

FOR FURTHER INFORMATION CONTACT: Richard Sims, State Conservationist, Natural Resources Conservation Service, 9173 W. Barnes Dr., Suite C, Boise, Idaho, 83709–1574, telephone: (208) 378–5700.

SUPPLEMENTARY INFORMATION: The preliminary information of this federally assisted proposed action indicates that the proposed action will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Richard Sims, State Conservationist, has determined that the preparation and review of an

environmental assessment is needed for this project.

The objective of the Lower Payette Ditch Company proposed action is to provide efficient water delivery, operator safety and low maintenance, reliability, and adequate fish and recreational boater passage, while not adversely affecting the environment. The proposed project would replace the existing deteriorating diversion structure with an automated inflatable diversion dam. Alternatives evaluated to meet these objectives include: No Action, Upgrade Existing Diversion Dam with an Automated Inflatable Dam, Replace Existing Diversion Dam with a Push-Up Diversion Dam.

The Lower Payette Ditch Company invites participation and consultation of agencies and individuals that have special expertise, legal jurisdiction, or interest in the preparation of the draft environmental assessment. A limited number of copies of the EA are available to fill single copy requests at the above address. Basic data developed during the environmental assessment is on file and may be reviewed by contacting Richard Sims.

Further information on the proposed action or future public meetings may be obtained from Richard Sims, State Conservationist, at the above address or telephone (208) 378–5700.

Dated: December 23, 2004.

Richard Sims,

State Conservationist.

[FR Doc. 05–509 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Change to the Natural Resources Conservation Service's National Handbook of Conservation Practices

AGENCY: Natural Resources Conservation Service, USDA, Idaho State Office.

ACTION: Notice of availability of proposed changes in the NRCS National Handbook of Conservation Practices, Section IV of the Idaho State NRCS Field Office Technical Guide (FOTG) for review and comment.

SUMMARY: It is the intention of the NRCS in Idaho to issue revised conservation practice standards in its National Handbook of Conservation Practices. The revised standards are: Alley Cropping (311), Waste Storage Facility (313), Brush Management (314), Composting Facility (317), Well Decommissioning (351), Waste Treatment Lagoon (359), Atmospheric Resource Quality Management (370), Silvopasture Establishment (381), Field Border (386), Irrigation Water Conveyance—Ditch and Canal Lining, Flexible Membrane (428B), Irrigation System, Sprinkler (442), Forest Site Preparation (490), Heavy Use Area Protection (561), Nutrient Management (590), Pest Management (595) and Salinity and Sodic Soil Management (610).

DATES: Comments will be received for a 30-day period commencing with this date of publication.

FOR FURTHER INFORMATION CONTACT: Inquire in writing to Richard W. Sims, State Conservationist, Natural Resources Conservation Service (NRCS), 9173 W. Barnes Dr., Suite C, Boise, Idaho 83709. Copies of the practice standards will be made available upon written request. You may also submit your electronic requests and comments to *barbara.albiston@id.usda.gov.*

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that revisions made after enactment of the law to NRCS State Technical Guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days, the NRCS in Idaho will receive comments relative to the proposed changes. Following that period, a determination will be made by the NRCS in Idaho regarding disposition of those comments and a final determination of change will be made.

Dated: December 23, 2004.

Richard W. Sims,

State Conservationist, Boise, Idaho.

[FR Doc. 05–508 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–803]

Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review: Certain Cut–To-Length Carbon Steel Plate from Romania

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Brandon Farlander at (202) 482–0182 or Abdelali Elouaradia at (202) 482–1374, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

SUPPLEMENTARY INFORMATION: On September 7, 2004, the Department of Commerce (''the Department'') published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on certain cut–to-length carbon steel plate from Romania. *See Certain Cut–to-Length Carbon Steel Plate From Romania: Preliminary Results of the Antidumping Duty Administrative Review and Notice of Intent To Rescind in Part*, 69 FR 54108 (September 7, 2004). Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, (''the Act''), the final results are currently due on January 5, 2005.

Extension of Time Limit for Final Results

Pursuant to section 751(a)(3)(A) of the Act, as amended, the Department may extend the deadline for completion of the final results of an administrative review if it determines that it is not practicable to complete the final results within the statutory time limit of 120 days from the date on which the preliminary results were published. The Department has determined that due to the complexity of the issues arising from Romania's graduation to market economy status during the review period, it is not practicable to complete this review within the time limits mandated by section 751(a)(3)(A) of the Act and section 19 CFR 351.213(h)(1) of the Department's regulations. Therefore, the Department is extending the time limit for the completion of these final results by 30 days. Accordingly, the final results of this review will now be due on February 4, 2005.

This notice is published in accordance with section 751(a)(3)(A) of the Act and section 19 CFR 351.213(h)(2) of the Department's regulations.

Dated: January 5, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 05–520 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–802]

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Amendment to the Notices of Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Amendment to Notices of Opportunity To Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation.

SUMMARY: This is an amendment to the notices of ''Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' with respect to Certain Cut-to-Length Carbon Steel Plate from the Russian Federation, that published on October 1, 2004 (69 FR 58889) and on January 3, 2005 (70 FR 74).

DATES: *Effective Date:* January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Sally Gannon or Jonathan Herzog, Office of Policy and Negotiations, Bilateral Agreements Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone (202) 482–0162 or (202) 482–4271, respectively.

Background

On October 1, 2004, the Department of Commerce (''the Department'') published a notice providing the opportunity to request an administrative review of the suspension agreement on Cut-to-Length Steel Plate from the Russian Federation (A–821–808) (''CTL Plate Agreement''). *See Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation,* 69 FR 58889 (October 1, 2004). However, effective January 23, 2003, the Department signed a new CTL Plate Agreement, which replaced the previous agreement. Therefore, the anniversary month of this suspension agreement should be January, and the previous notice was in error with respect to this case. Thus, the Department is now providing notice of the opportunity to request an administrative review of the CTL Plate Agreement for the period of January 1, 2004 through December 31, 2004.

This notice is published in accordance with sections 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(I).

Dated: January 4, 2005.

Holly A. Kuga,

Senior Office Director, Office 4 for Import Administration.

[FR Doc. E5–40 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–506

Porcelain–on-Steel Cooking Ware from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from Shanghai Watex Metal Products, Co., Ltd., the Department of Commerce initiated a new shipper review of the antidumping duty order on porcelain–on-steel cooking ware from the People's Republic of China. The period of review is December 1, 2003, through May 31, 2004. For the reasons discussed below, this new shipper review is being rescinded.

EFFECTIVE DATE: January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Anya Naschak or Benjamin Kong, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone: (202) 482–6375 and (202) 482–7907, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 16, 2004, the Department of Commerce (''the Department'') initiated a new shipper review of Shanghai Watex Metal Products, Co., Ltd. (''Watex'') under the antidumping duty order on porcelain–on-steel cooking ware (''POS'') for the period December 1, 2003, through May 31, 2004. *See Certain Porcelain–On-Steel Cookware from the People's Republic of China: Initiation of New Shipper Antidumping Duty Review*, 69 FR 55795 (September 16, 2004) (''*Initiation Notice*''). The Department's initiation of a new shipper review of Watex was based on, among other things, Watex's certification that it was both the exporter and producer of the subject merchandise for which it requested new shipper review. See 19 CFR 351.214(b)(i) and *Initiation Notice*. Relying on the certification provided by Watex, the Department issued instructions to US. Customs and Border Protection (''CBP'') in accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended (''the Act''), which allowed, at the option of the importer, the posting, until completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise for which Watex was both the producer and exporter.

On October 25, 2004, Watex submitted its Section A, C and D Questionnaire[1] response (''Response'') to the Department. In this response, Watex reported for the first time that another company, Shanghai Ping An Enamel Products Co. (''Ping An''), actually produced the subject merchandise that Watex exported to the United States. *See* Response, at page A–2.

On November 12, 2004, Columbian Home Products, LLC (''Petitioner'') submitted a letter to the Department requesting that the Department rescind the new shipper review of Watex because Watex failed to provide the proper certification as required by 19 CFR 251.214(b)(2). Petitioner based its rescission request on Watex's incorrect statement in its initial request that it was both the exporter and producer of the subject merchandise and its failure to provide certifications from Ping An in its initial request for a new shipper review. On November 24, 2004, Watex submitted its response to Petitioner's November 12, 2004, request. Watex claimed that it unintentionally omitted the certification from Ping An in its request for review. Watex further stated that the delayed certification neither materially impacted nor prejudiced any party in the review. On November 29, 2004, Petitioner responded to Watex's November 24, 2004, comments, noting that the essential question is not whether the delayed certification had a material impact or prejudiced any party to this case, but rather whether the regulatory requirements for initiating

[1] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under this investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales, or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy (NME) cases). Section C requests a complete listing of U.S. sales. Section D requests information on the factors of production of the merchandise under investigation. Section E requests information on further manufacturing.

the new shipper review were met, and in this case they were not.

On December 6, 2004, the Department notified parties of its intent to rescind the review with respect to Watex because Watex failed to provide in its new shipper review request the necessary certification from the producer or supplier of the subject merchandise. The Department also determined that Watex provided misleading statements in its request for new shipper review and in its certification suggesting it was both the producer and exporter when it in fact was not. Based on these findings, the Department determined that it did not have a sufficient basis to initiate the new shipper review of Watex. *See* ''Memorandum to the File: Antidumping New–Shipper Review of Certain Porcelain–on-Steel Cookware from the People's Republic of China: Notification of Intent to Rescind,'' dated December 6, 2004 (''Intent to Rescind''). The Department requested comments from interested parties on this issue no later than December 10, 2004. No parties filed any comments in response to the Department's Intent to Rescind of December 6, 2004.

Scope of the Order

Imports covered by this order are shipments of POS, including teakettles, which do not have self–contained electric heating elements. All of the foregoing are constructed of steel and are enameled or glazed with vitreous glasses. The merchandise is currently classifiable under the Harmonized Tariff Schedule (''HTS'') item number 7323.94.00. The HTS item number is provided for convenience and customs purposes; the written description of the scope remains dispositive.

Rescission of Review

The Department is rescinding the new shipper review with respect to Watex. As noted above, Watex did not provide the proper certification, pursuant to 19 CFR 351.214(b)(2)(ii)(B), to meet the minimum requirements for entitlement to a new shipper review. In order to meet the minimum requirements for entitlement to a new shipper review, a company that is the exporter but not the producer of the subject merchandise for which it requests review must provide, among other things, (1) a certification that it did not export subject merchandise to the United States during the POI and (2) a certification from the person or company which produced or supplied the subject merchandise that the producer or supplier did not export the subject merchandise to the United States during the POI. *See* 19 CFR 351.214(2)(ii)(A) and (B).

Watex did not provide a certification in accordance with 19 CFR 351.214(b)(2)(ii)(B), in its initial request, from the producer of subject merchandise that Watex sold or exported to the United States during the POR. Specifically, Watex was required to provide in its review request a certification from Ping An because Ping An produced the merchandise subject to this review, as confirmed by information contained in Watex's Response. Therefore, Watex did not meet the minimum certification requirements for initiation of a new shipper review. A certification from the producer is fundamental to the Department's initiation decision. Since Watex did not provide the certification, the Department has determined that Watex failed to provide all necessary certifications required to initiate and conduct a new shipper review. For these reasons and in accordance with our precedent, the Department is rescinding the new shipper review of the antidumping duty order on POS from the People's Republic of China (''PRC'') with respect to Watex pursuant to 19 CFR 351.214(b)(2). *See, e.g., Certain Preserved Mushrooms from the People's Republic of China: Intent to Rescind Antidumping Duty New Shipper Review*, 68 FR 45792 (August 4, 2003); *Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty New Shipper Review*, 67 FR 65782 (October 28, 2002).

Cash Deposits

Bonding is no longer permitted to fulfill security requirements for shipments from Watex of POS from the PRC entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this notice of rescission of antidumping duty new shipper review in the **Federal Register**. Further, effective upon publication of this notice for all shipments of the subject merchandise exported by Watex and entered, or withdrawn from warehouse, for consumption, the cash–deposit rate will be the PRC–wide rate, which is 66.65 percent.

Notification to Interested Parties

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.This rescission notice is published in accordance with sections 751(a)(2)(B) and 777(i) of the Act and 19 CFR 351.214.

Dated: January 3, 2005.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E5–39 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–805]

Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: January 11, 2005.

FOR FURTHER INFORMATION CONTACT: David Layton or Erin Begnal, China/NME Unit, Office 8, AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0371 and (202) 482–1442, respectively.

SUPPLEMENTARY INFORMATION: On September 7, 2004, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on certain small diameter carbon and alloy seamless standard, line, and pressure pipe from Romania. *See Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Preliminary Determination Not To Revoke in Part*, 69 FR 54119 (September 7, 2004) (*Seamless Pipe Preliminary Results*). Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), the final results are currently due on January 5, 2005.

Extension of Time Limit for Final Results

Pursuant to section 751(a)(3)(A) of the Act,, the Department may extend the deadline for completion of the final

results of an administrative review if it determines that it is not practicable to complete the final results within the statutory time limit of 120 days from the date on which the preliminary results were published. The Department has determined that due to the complexity of the issues arising from Romania's graduation to market economy status during the review period, it is not practicable to complete this review within the time limits mandated by section 751(a)(3)(A) of the Act and section 19 CFR 351.213(h)(1) of the Department's regulations. Therefore, the Department is extending the time limit for the completion of these final results by 30 days. Accordingly, the final results of this review will now be due on February 4, 2005.

This notice is published in accordance with section 751(a)(3)(A) of the Act and section 19 CFR 351.213(h)(2) of the Department's regulations.

Dated: January 5, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E5–61 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–816]

Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 7, 2004, the Department of Commerce (''Department'') published in the **Federal Register** the preliminary results of the administrative review of the order on certain stainless steel butt-weld pipe fittings from Taiwan. *See Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent To Rescind in Part,* 69 FR 40859 (July 7, 2004) (''*Preliminary Results*''). This review covers one manufacturer/exporter of the subject merchandise. The period of review (''POR'') is June 1, 2002, through May 31, 2003.

We gave interested parties an opportunity to comment on the preliminary results. Based upon our analysis of the comments received, we have made no changes in the margin calculation. Therefore, the final results have not changed from the *Preliminary Results* of this review. The final weight-averaged dumping margin is listed below in the section titled ''Final Results of the Review.''

EFFECTIVE DATE: January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik or Alex Villanueva, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone (202) 482–6905 or (202) 482–3208, respectively, fax (202) 482–9089.

SUPPLEMENTARY INFORMATION:

Background

The Department's preliminary results of review were published on July 7, 2003. *See Preliminary Results.* We invited parties to comment on the *Preliminary Results.* We received written comments on August 13, 2004, from Petitioners [1] and from Ta Chen Stainless Pipe Co., Ltd. (''Ta Chen'') and its wholly owned subsidiary Ta Chen International, Inc. (''TCI''). On August 20, 2004, we received rebuttal comments from Petitioners and Ta Chen. On October 20, 2004, the Department extended the final results of this review by 45 days until December 19, 2003. *See Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Extension of Final Results of Antidumping Duty Administrative Review,* 69 FR 61649, (October 20, 2004). On December 16, the Department fully extended the final results by the remaining 15 days, or until January 3, 2005. *See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Extension of Final Results of Antidumping Duty Administrative Review,* 69 FR 75305, (December 16, 2004). The Department is conducting this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (''the Act'').

Scope of the Order

The products subject to this order are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter. Certain welded stainless steel butt-weld pipe fittings (''pipe fittings'') are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; and (5) high pressures are contained within the system.

Pipe fittings come in a variety of shapes, with the following five shapes the most basic: ''elbows'', ''tees'', ''reducers'', ''stub ends'', and ''caps.'' The edges of finished pipe fittings are beveled. Threaded, grooved, and bolted fittings are excluded from this review. The pipe fittings subject to this review are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (''HTSUS'').

Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this review is dispositive. Pipe fittings manufactured to American Society of Testing and Materials specification A774 are included in the scope of this order.

Partial Rescission of Review

In the *Preliminary Results,* the Department issued a notice of intent to rescind the review with respect to Liang Feng Stainless Steel Fitting Co., Ltd. (''Liang Feng''), Tru-Flow Industrial Co., Ltd. (''Tru-Flow''), and PFP Taiwan Co., Ltd. (''PFP'') as we found that there were no entries of subject merchandise during the POR. *See Preliminary Results* at 40861. The Department received comments on this issue concerning Liang Feng and Tru-Flow. However, we continue to find that rescission of the review concerning Liang Feng, Tru-Flow and PFP is appropriate. Therefore, the Department is rescinding the review with respect to Liang Feng, Tru-Flow, and PFP.

Analysis of Comments Received

All issues raised in the case briefs, as well as the Department's findings, in this administrative review are addressed in the *Issues and Decision Memorandum for the Administrative Review of Stainless Steel Butt-Weld Pipe Fittings from Taiwan,* (''*Decision Memorandum*''), dated January 3, 2005, which is hereby adopted by this notice. A list of the issues raised and to which we have responded, all of which are in the *Decision Memorandum,* is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this

[1] Petitioners in this administrative review are Flowline Division of Markovitz Enterprise, Inc., Shaw Allow Piping Products, Inc., Gerlin, Inc., and Taylor Forge Stainless, Inc.

public memorandum which is on file at the U.S. Department of Commerce, in the Central Records Unit, in room B–099. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Web at *www.ia.ita.doc.gov*.[2]

Sales Below Cost in the Home Market

As discussed in more detail in the *Preliminary Results,* the Department disregarded home market below-cost sales that failed the cost test in the final results of review.

Changes Since the Preliminary Results

A list of the issues which parties have raised and to which we have responded, all of which are in the *Decision Memorandum,* is attached to this notice as Appendix I. Based on our analysis of the comments received, we have made no changes in the margin calculation.

Final Results of the Review

We determine that the following percentage weighted-average margin exists for the period June 1, 2002, through May 31, 2003:

CERTAIN STAINLESS STEEL BUTT-WELD PIPE FITTINGS FROM TAIWAN

Producer/ manufacturer/exporter	Weighted-average margin (percent)
Ta Chen Stainless Pipe Co., Ltd	5.08

Assessment Rates

The Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated an importer-specific assessment rate for merchandise subject to this review. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review. We will direct CBP to assess the resulting assessment rates against the entered customs values for the subject merchandise on each of the importer's entries during the review period. For duty assessment purposes, we calculated importer-specific assessment rates by dividing the dumping margins calculated for each importer by the total entered value of sales for each importer during the POR.

[2] The paper copy and electronic version of the public version of the *Decision Memorandum* are identical in content.

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, the following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of certain stainless steel butt-weld pipe fittings from Taiwan entered, or withdrawn from warehouse, for consumption on or after the date of publication: (1) The cash deposit rate for Ta Chen will be the rate shown above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers shall continue to be 51.01 percent.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Notification of Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 C.F.R. 351.305. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: January 3, 2005.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix I—List of Issues for Discussion

Comment 1: Adverse Facts Available (''AFA'') for the Emerdex Companies [3]
Comment 2: Partial AFA for Dragon Stainless Inc. (''Dragon Stainless'') Selling Expenses
Comment 3: Whether To Apply Total AFA for Ta Chen
Comment 4: Constructed Export Price (''CEP'') Offset and Level of Trade (''LOT'')
Comment 5: CEP Profit
Comment 6: Date of Sale for Home and U.S. Market Sales
Comment 7: Overstated Home Market Packing Expenses
Comment 8: Short-Term Borrowing
Comment 9: Total AFA for Liang Feng and Tru-Flow

[FR Doc. E5–62 Filed 1–10–05; 8:45 am]
BILLING CODE 3510–22–P

[3] The Department will address all the Emerdex companies within this comment: Emerdex Stainless Flat Roll Products (''Emerdex 1''), Emerdex Stainless Steel (''Emerdex 2''), Emerdex Group, Inc. (''Emerdex 3'') and Emerdex Shutters (''Emerdex 4'').

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

I.D. 060804F

Endangered Fish and Wildlife; Notice of Intent to Prepare an Environmental Impact Statement

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice of Public Scoping and Intent (NOI) to prepare an Environmental Impact Statement (EIS); request for written comments.

SUMMARY: NMFS will be preparing an EIS to analyze the potential impacts of applying new criteria in guidelines to determine what constitutes a ''take'' of a marine mammal under the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA) as a result of exposure to anthropogenic noise in the marine environment. This notice describes the proposed action and possible alternatives and also describes the proposed scoping process.

DATES: NMFS will hold 4 public meetings to obtain comments on the scope of issues to be addressed in the EIS. The locations of the meetings are San Francisco, CA; Seattle, WA; Boston, MA; and Silver Spring, MD. See Supplementary Information for

meetings dates and locations. In addition to obtaining comments in the public scoping meetings, NMFS will also accept written and electronic comments. Comments must be received by March 14, 2005.

ADDRESSES: Written comments on the scope of the EIS and requests to participate in the public scoping meetings should be submitted to P. Michael Payne, Chief, Marine Mammal Conservation Division, Office of Protected Resources, NMFS (F/PR2), 1315 East-West Highway, Silver Spring, MD 20910. Written comments may also be submitted by email to *AcousticEIS.Comments@noaa.gov* or by facsimile (fax) to (301) 427–2581. Include in the subject line the following identifier: I.D. 060804F.

FOR FURTHER INFORMATION CONTACT: Brandon Southall, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; Telephone (301) 713–2322. Additional information is available at (*www.nmfs.noaa.gov/prot_res/PR2/Acoustics_Program*). For information regarding the EIS process, contact Michael Payne at the above referenced contact information.

SUPPLEMENTARY INFORMATION:

Meetings Dates and Locations

The San Francisco, CA scoping meeting: January 18, 2005, 5 p.m. - 8 p.m. The meeting location is Hilton Fisherman's Wharf, 2620 Jones Street, San Francisco, CA, 94133,

telephone: 415–885–4700.

The Seattle, WA scoping meeting: January 20, 2005,

5p.m. – 8p.m. The meeting location is NOAA's Western Regional Center, Building 9 Auditorium, 7600 Sand Point Way NE, Seattle, WA, 98115.

The Boston, MA scoping meeting: January 25, 2005,

5p.m. – 8p.m. The meeting location is the New England Aquarium, Conference Center, Central Wharf, Boston, MA 02110.

The Silver Spring, MD scoping meeting: January 27, 2005, 5p.m. – 8p.m. The meeting location is the NOAA's Auditorium, 1301 East West Highway, Silver Spring, MD 20910.

Background

Section 3(18)(A) of the MMPA defines ''harassment'' as:

...any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

The National Defense Authorization Act, enacted in November 2003, altered the definition of marine mammal harassment for ''military readiness activities'' and ''scientific research activities conducted by or on behalf of the Federal Government consistent with section 104 (c)(3)'' of the MMPA, as follows:

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment];

(ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B harassment].

NMFS has been using generic sound exposure thresholds since 1997 to determine when an activity in the ocean that produces sound might result in impacts to a marine mammal such that a take by harassment might occur (an 'acoustic' take). NMFS is developing new science-based thresholds to improve and replace the current generic exposure level thresholds that have been used since 1997.

Proposed Action

NMFS will be proposing to replace the current Level A and Level B harassment thresholds with guidelines based on exposure characteristics that are derived from empirical data and are tailored to particular species groups and sound types. These guidelines will identify exposures levels and durations that may produce either temporary or permanent shifts in hearing sensitivity thereby providing a more scientific basis for defining the threshold levels that might result in marine mammal harassment. Such information would be of use to industry (oil and gas, marine construction), researchers, academic, government, military and shipping activities.

As currently envisioned, the noise exposure guidelines would be based on the following sets of criteria. They would divide marine mammals into five functional hearing groups: low-frequency cetaceans (all mysticetes or baleen whales); mid-frequency cetaceans (all odontocete species (dolphins and porpoises) not included in the low or high frequency groups); high-frequency cetaceans (harbor and Dall s porpoise, river dolphins); pinnipeds under water (seals, fur seals and sea lions); and pinnipeds out of water. Each of the functional hearing groups has somewhat different hearing capabilities. Consequently, frequency-specific thresholds are being developed based on what is known about these differences.

The criteria would also categorize all anthropogenic sounds into four different types: single pulses (brief sounds with a fast rise time); single non-pulses (all other sounds); multiple pulses in a series; and multiple non-pulses in a series. Each of the five functional hearing groups would then be paired against the four sound types resulting in a matrix of values. These values would represent the noise-exposure criteria that NMFS would use, at least in part, to guide determinations of when an anthropogenic sound results in an acoustic ''take'' by harassment under the MMPA or ESA for each of the different marine mammal hearing groups. All threshold values would be expressed in terms of either a sound pressure level value that the animal receives, or as a measure of exposure that incorporates both sound pressures and time as a dimension where it is appropriate. This is referred to as the sound exposure, or energy flux density level. Energy levels are not directly comparable to pressure levels because of the time dimension.

A number of assumptions will be made in developing the acoustic matrix of threshold levels. For example, in most cells within the matrix, the criteria assume that all species in a functional hearing group have the same threshold apply to all species in the group. In reality, some species are so different from others in their functional hearing group that separate threshold criteria are appropriate for them. Further, there are no direct data on the effects of many kinds of sounds on many species of marine mammals. For now, therefore, it is necessary to extrapolate making reasonably conservative criteria from existing data to cover cases of missing data. An example of an extrapolation is the use of data from dolphins or beluga whales for other cetaceans. Most data on the effects of noise on marine mammals come from mid-frequency dolphins, especially bottlenose dolphins and beluga whales. The results of studies on these species are applied directly to low- and high-frequency cetaceans (for which data are sparse or non existent) without adjustment. This substitution is likely conservative for low frequency cetaceans because the mid-frequency cetacean ear is almost certainly more sensitive. The substitution is also likely satisfactory for high-frequency cetaceans. In the absence of data for marine mammals, in some cases, data from terrestrial mammals are used in determining exposure criteria.

Purpose of the Action

NMFS will prepare an EIS to assess the potential impacts of the proposed framework for developing and implementing science-based acoustic Atake@ criteria. The EIS will analyze the potential environmental impacts resulting from implementation of the proposed noise exposure criteria to determine acoustic-based harassment of marine mammals, and alternative noise exposure criteria.

The areas of interest for evaluation of environmental and socioeconomic effects will be U.S. and international waters.

Use of the Noise Exposure Criteria

The noise exposure criteria would be used to inform NMFS guidelines as to what characteristics of human sound exposure (e.g., exposure frequency, level, and duration) might result in harassment and constitute a Atake@ under the MMPA and ESA. For example, an acoustic ''take'' might be considered to have occurred whenever the sound that the animal receives exceeds the exposures defined by the criteria. The noise exposure criteria would also provide guidance with respect to what type of take might result from exposure to sound - one for Level A harassment and one for Level B harassment.

Scope of the Action

The scope of the EIS will identify and evaluate all relevant impacts, conditions, and issues associated with the proposed framework for the development and implementation of these criteria, and alternatives, in accordance with Council on Environmental Quality=s (CEQ) Regulations at 40 CFR parts 1500 - 1508, and NOAA=s procedures for implementing NEPA found in NOAA Administrative Order (NAO) 216–6, Environmental Review Procedures for Implementing the National Environmental Policy Act, dated May 20, 1999.

The EIS will analyze the potential environmental impacts of implementation of the proposed framework and noise exposure criteria to determine acoustic ''takes'' of marine mammals, and alternative frameworks for developing and implementing noise exposure criteria. The EIS must meet the requirements of NEPA and the analyses must also document compliance with the related environmental impact analysis requirements of other statutes and executive orders. These include, but are not limited to, the MMPA, Coastal Zone Management Act, ESA, and the Magnuson-Stevens Fishery Conservation and Management Act.

Alternatives

The EIS will consider several alternatives for determining the acoustic threshold at which both Level A and Level B harassment takes might occur: 1) maintaining the status quo (the no action alternative); 2) using a precautionary approach and very conservative interpretations of data on marine mammals based on considering human noise exposures relative to ambient noise conditions; 3) defining a Level A harassment take as that exposure which results in a temporary shift in hearing sensitivity (TTS) and a Level B harassment take as that exposure estimated to result in a 50 percent behavioral avoidance for each species or group of species; 4) defining Level A harassment take as that exposure which results in a Permanent Threshold Shift (PTS) minus 6 decibels (dB) and defining a Level B harassment take as a level 6 dB below that exposure estimated to causes TTS; 5) defining a Level A harassment take as noise exposure consistent with estimated PTS onset and a level B harassment take as TTS onset; and 6) defining a Level A harassment take as occurring at the PTS onset plus 6 dB and level B harassment take as 6 dB below the estimated point of PTS onset (see Table 1).

TABLE 1: ACOUSTIC CRITERION FOR EACH OF THE PROPOSED ALTERNATIVES

Alternative	Level A Criterion	Level B Criterion
I (Status Quo)	180 dB_{rms} re: 1μPa	160 dBrms re: 1μPa (impulse) 120 dBrms re: 1μPa (continuous).
II	Highest average	lowest possible natural ambientambient.
III	TTS Onset	50% Behavioral Avoidance.
IV	PTS Onset–6dB	TTS Onset–6dB.
V	PTS Onset	TTS Onset.
VI	PTS Onset+6dB	PTS Onset–6dB.

Alternative I: A no action alternative would perpetuate the use of the existing thresholds for Level A harassment (sound pressure level of 180 dBrms re: 1μPa) (hereafter dB SPL), and Level B harassment (160 dB SPL for impulse noise and 120 dB SPL for continuous sound) that have been used for the past six years. The advantages of this alternative are that the public is familiar with this approach, and safety zones can easily be calculated from standard sound propagation models. A disadvantage is that this considers only the sound pressure level of an exposure but not its other attributes, such as duration, frequency, or repetition rate, all of which are critical for assessing impacts on marine mammals. For example, a sound of 181 dB SPL lasting for two seconds would be identified as a Level A harassment take, but a potentially more harmful sound of 179 dB SPL lasting two days is currently considered a Level B harassment take. It also assumes a consistent relationship between rms (root-mean-square) and peak pressure values for impulse sounds, which is known to be inaccurate under certain (many) conditions.

Alternative II: A second alternative is based on very conservative behavioral response data for marine mammals. Under this alternative takes would occur at the SPL at which the most sensitive species first begin to show a behavioral response. Level A harassment would occur if the received noise from a human source exceeded the highest average ambient noise level in the area of operation. Level B harassment would occur if the received noise from a human source exceeded the lowest possible ambient noise condition. Criteria based largely on behavioral responses to noise just above ambient level would be extremely conservative. Under this alternative, a behavioral response may, and behavioral avoidance would, constitute Level B harassment.

Alternative III: A third alternative would define a Level A harassment take as occurring at that level of exposure which results in a temporary loss of hearing sensitivity (TTS) but which is fully recoverable. This approach is also conservative because scientific experts in this field do not consider TTS to

result in harm or injury because no irreversible cell damage is involved. A Level B harassment take would be defined as that level of noise exposure known or estimated to result in 50 percent behavioral avoidance of a sound source for each species or animal group. There are a small number of these types of empirical data available for certain conditions, but some of the level B criteria constructed in this manner would require extrapolations and assumptions, particularly in the above context of how biological significance is defined. Generally this alternative would be less conservative than the previous alternative.

Alternative IV: A fourth alternative would determine that a Level A harassment take occurs at that level of noise exposure which results in a permanent loss of hearing sensitivity (PTS) due to non-recoverable cell damage, minus some ''safety'' factor. This alternative would be more conservative than federal workplace standards for humans which permit exposures that result in some degree of PTS over a lifetime for some individuals. A doubling of absolute sound pressure magnitude (in µPa) represents a 6 dB increase in SPL. A proposed ''safety'' factor to ensure that exposures do not result in permanent injury is to set the Level A harassment criteria 6 dB below that noise exposure estimated to cause PTS onset for each animal group. The proposed Level B harassment take criteria for alternative 4 are those exposures resulting in TTS onset minus a ''safety'' factor of 6 dB.

Alternative V: A fifth alternative defines a Level A harassment take as noise exposures estimated to result in PTS onset and Level B harassment take as noise exposures consistent with TTS onset for each animal group. This alternative would allow Level A harassment criteria levels that are higher than either TTS (Alternative III) or PTS minus some safety factor (Alternative IV); Level A harassment criteria would be based on those exposures that are believed to result in irreversible tissue damage. The Level B harassment criteria under Alternative V would set the take threshold slightly higher than Alternative IV but considerably below those in Alternative 6.

Alternative VI: A sixth alternative defines a Level A harassment take based on estimated PTS onset (as in Alternatives 4 and 5), but requires a higher probability of exposed animals experiencing a meaningful change in hearing sensitivity above merely the onset of tissue injury, such as 6 dB of PTS. Under Alternative VI, Level B harassment take would be defined as exposures estimated as 6 dB below those required to cause PTS onset. This alternative would result in noise threshold levels that are greater than any of the other proposed alternatives.

The noise exposure criteria are based on research available for all species of marine mammals, plus some data from terrestrial mammals and humans. Using data from one species of mammals to set criteria for another species is acceptable for injury because the anatomy of the inner ear of all mammals is extremely similar. As an example, certain human hearing standards are based in part on extrapolations from the effects of noise on the chinchilla ear. Table 2 provides an example of noise exposure criteria that would result under each of the proposed alternatives for gray whales. Gray whales were selected as an example because some data on behavioral reactions exist and are used (in Alternative III), but setting criteria based on TTS or PTS rely on extrapolations from other cetacean species (Alternatives III-VI). The use of direct information combined with reasonable extrapolation is representative of how such criteria would be established under any of the alternatives.

TABLE 2: EXAMPLE OF NOISE EXPOSURE CRITERIA FOR GRAY WHALES FOR EACH OF THE PROPOSED ALTERNATIVES

Alternative	Level A Criterion	Level B Criterion
I	180 dB_{rms} re: 1µPa	160 dB_{rms} re: 1µPa (impulse) 120 dB_{rms} re: 1µPa (continuous).
II	Both criteria variable	depending on environment.
III	195 dB re: 1µPa^2(s)	160 dB_{rms} re: 1µPa.
IV	209 dB re: 1µPa^2(s)	189 dB re: 1µPa^2(s).
V	215 dB re: 1µPa^2(s)	195 dB re: 1µPa^2(s).
VI	221 dB re: 1µPa^2(s)	209 dB re: 1µPa^2(s).

Alternative I indicates the status quo criteria already in place. Alternative II criteria are established based on ambient noise conditions experienced by animals in the area of operation. Since these conditions may be dominated by either natural or human noise and are quite variable depending on many spatial and temporal factors, the criteria for determining both Level A and Level B harassment are variable depending on the operational environment.In Alternative III, the Level A criterion is set at noise exposures estimated to cause TTS [195 dB re: 1µPa2(s). This is the estimated point of TTS onset for cetaceans based on Finneran et al. (2002)]. For Alternative III, Level B criteria are based on behavioral avoidance data for migrating gray whales (Malme *et al.*, 1983; 1984). These are, in fact, the same data upon which the status quo (Alternative I) Level B data are based.

An additional extrapolation is made in Alternative IV to estimate PTS. The level of noise exposure required to induce PTS in marine mammals is unknown, but may be estimated using the TTS onset data and extrapolations based on terrestrial mammals. Using the slope of the function relating increases in noise exposure and TTS, and using a relatively conservative estimate of PTS as 40 dB of TTS, it is estimated that an additional 20 dB of noise exposure is required above TTS onset to induce PTS. Thus, for Alternative IV, the Level A harassment criterion is estimated TTS onset (195 dB re: 1µPa^2(s)) plus 20 dB to equal PTS onset (215 dB re: 1µPa2(s)) minus 6 dB, or 209 dB re: 1µPa^2(s). The Level B harassment criterion for Alternative IV is estimated TTS onset (195 dB re: 1µPa^2(s)) minus 6 dB, or 189 dB re: 1µPa^2(s).

For Alternative V, the Level A harassment criterion is the estimated PTS onset (215 dB re: 1µPa2(s) as described above) and the Level B harassment criterion is estimated TTS onset (195 dB re: 1µPa^2(s)). In Alternative VI, the Level A harassment criterion is 6 dB above estimated PTS onset (or 221 dB re: 1µPa2(s)) while the Level B harassment criterion is 6 dB below estimated PTS onset (or, 209 dB re: 1µPa^2(s)).

Public Involvement and the Scoping Process

NMFS' intent is to afford an opportunity for the public, including interested citizens and environmental organizations; any affected low-income or minority populations; affected local, state and Federal agencies; and any other agencies with jurisdiction or special expertise concerning the environmental impacts to be addressed in the EIS to participate in this process.

NMFS will hold public scoping meetings and accept oral and written comments (See **ADDRESSES**) to determine the issues of concern with respect to practical considerations involved in applying these criteria and to determine whether NMFS is addressing the appropriate range of alternatives. In addition to comments on other aspects of the scope of this EIS, NMFS is particularly interested in comments regarding real-world application of the science-based noise exposure criteria. The public, as well as Federal, state, and local agencies, are encouraged to participate in this scoping process. The dates and locations of these meetings appear in this **Federal Register** notice (See **SUPPLEMENTARY INFORMATION**).

NMFS is also seeking written comments on the scope of issues that should be addressed in the EIS. The agency also invites the public to submit data, new information, and comments by e-mail, mail, or fax (See **ADDRESSES**) identifying relevant environmental and socioeconomic issues to be addressed in the environmental analysis.

Dated: January 6, 2005.

P. Michael Payne,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–525 Filed 1–6–05; 3:17 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010605B]

North Pacific Fishery Management Council; Notice of Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Meetings of the North Pacific Fishery Management Council and its advisory committees.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory committees will hold public meetings February 7 through February 15, 2005 at the Renaissance Madison Hotel, 515 Madison Street, Seattle, Washington.

DATES: The Council's Advisory Panel will begin at 8 a.m., Monday, February 7 and continue through Friday February 11, 2005. The Scientific and Statistical Committee will begin at 8 a.m. on Monday, February 7, 2005, and continue through Wednesday, February 9, 2005.

The Council will begin its plenary session at 8 a.m. on Wednesday, February 9 and continuing through Tuesday February 15. All meetings are open to the public except executive sessions. The Enforcement Committee will meet Tuesday, February 8 from 1 pm to 5 pm. The Ecosystem Committee will meet Monday, February 7, from 1 pm to 5 pm.

ADDRESSES: Renaissance Madison Hotel, 515 Madison Street, Seattle, Washington.

Council address: North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Council staff; Phone: 907–271–2809.

SUPPLEMENTARY INFORMATION:

Council Plenary Session

The agenda for the Council's plenary session will include the following issues. The Council may take appropriate action on any of the issues identified.

Reports

Executive Director's Report
National Marine Fisheries Service Management Report
Enforcement Report
Coast Guard Report
Alaska Department of Fish & Game Report (and review of proposals to Board of Fisheries)
U.S. Fish & Wildlife Service Report
Protected Species Report (Review MMPA listing proposed rule

Essential Fish Habitat (EFH) and Habitat Area Particular Concern (HAPC)

Review changes to EFH Environmental Impact Statement (EIS). Final action on EFH Preferred Alternative. Final action on HAPC alternatives and Environmental Assessment/Regulatory Impact Statement/Initial Regulatory Flexibility Analysis.

Gulf of Alaska Groundfish (GOA) Rationalization

Receive report from Community Committee and action as necessary. Review crab/salmon bycatch data and refine alternatives.

GOA Rockfish Demonstration Project

Review available information and refine alternatives as appropriate.

Improved Retention/Improved Utilization (IR/IU)

Review progress on Amendment 80 analysis and legal issues, and provide direction as necessary.

American Fisheries Act

Review 2004 cooperative (co-op) reports and 2005 co-op agreements.

Bering Sea and Aleutian Island (BSAI) Bycatch

Review action plan and refine alternatives.

Groundfish Management

Non-Target Species Committee report. Review rockfish management preliminary discussion paper. GOA and BSAI Other Species breakout: Review action plan. AI Special Management Area: Review discussion paper. GOA pollock trip limits: Review discussion paper. Review EFP for Seabird avoidance measures. (T)

Staff Tasking

Review Seldovia Village request for Amendment 66 eligibility. Review tasking and Committee and initiate action as appropriate.

Other Business

Scientific and Statistical Committee (SSC)

The SSC agenda will include the following issues:

1. EFH and Center for Independent Experts
2. Groundfish Management
3. Special Session on Modeling Workshop

Advisory Panel

The Advisory Panel will address the same agenda issues as the Council.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at 907–271–2809 at least 7 working days prior to the meeting date.

Dated: January 6, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E5–57 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010605A]

Pacific Fishery Management Council; Public Meeting/Workshop

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Groundfish Stock Assessment Review (STAR) Panel for Pacific hake (Whiting) will hold a work session which is open to the public.

DATES: The Pacific hake (Whiting) STAR Panel meeting will be held beginning 1 p.m., February 1, 2005. The meeting will continue on February 2, 2005, beginning at 8:30 a.m. through February 3, 2005. The meetings will end at 5 p.m. each day, or as necessary to complete business.

ADDRESSES: The Pacific hake (Whiting) STAR Panel meeting will be held at the National Marine Fisheries Service, Northwest Fisheries Science Center, 2725 Montlake Boulevard East, Seattle, WA 98112; telephone: 206–860–3200.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Ms. Stacey Miller, Northwest Fisheries Science Center (NWFSC); telephone: 206–860–3480; or Mr. John DeVore, Pacific Fishery Management Council; telephone: 503–820–2280.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to review draft whiting stock assessment documents and any other pertinent stock information, work with the Stock Assessment Team to make necessary revisions to the draft whiting stock assessment, and produce a STAR Panel report for use by the Council family and other interested persons. No management actions will be decided by the STAR Panel. The STAR Panel's role will be development of recommendations and reports for consideration by the Council at its March meeting in Sacramento, California.

Entry to the NWFSC requires visitors to show a valid picture ID and register with security. A visitor's badge, which must be worn while at the NWFSC facility, will be issued to non-federal employees participating in the meeting.

Although nonemergency issues not contained in the meeting agenda may come before the workshop participants for discussion, those issues may not be the subject of formal workshop action during this meeting. Workshop action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the workshop participants' intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at 503–820–2280 at least 5 days prior to the meeting date.

Dated: January 6, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E5–58 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010505A]

Endangered Species; Permit No. 1429

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Scientific research permit modification.

SUMMARY: Notice is hereby given that a request for modification of scientific research Permit No. 1429 submitted by the National Marine Fisheries Service, Southeast Fisheries Science Center (SEFSC) has been granted.

ADDRESSES: The modification and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289, fax (301)427–2521; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Ruth Johnson, (301)713–2289.

SUPPLEMENTARY INFORMATION: The requested amendment has been granted under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 et seq.) and the provisions of 50 CFR 222.306 of the regulations governing the taking, importing, and exporting of endangered and threatened fish and wildlife (50 CFR 222–226).

The modification extends the expiration date of the Permit from December 31, 2004, to December 31, 2005, for takes of green (*Chelonia mydas*), loggerhead (*Caretta caretta*), olive ridley (*Lepidochelys olivacea*), leatherback (*Dermochelys coriacea*), hawksbill (Eretmochelys imbricata) and Kemp's ridley (*Lepidochelys kempii*) sea turtles. The permit allows the SEFSC to conduct sea turtle bycatch reduction research in the pelagic longline fishery of the western north Atlantic Ocean. The purpose of the research is to develop and test methods to reduce bycatch that occurs incidental to commercial pelagic longline fishing.

Issuance of this modification, as required by the ESA was based on a finding that such permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of the threatened and endangered species which are the subject of this permit; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: January 5, 2004.

Patrick Opay,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–529 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010405A]

Marine Mammals; File No. 376–1520

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of permit amendment.

SUMMARY: Notice is hereby given that Dr. James Hain, Associated Scientists at Woods Hole, Woods Hole, MA has been issued an amendment to a permit for scientific research on a variety of cetaceans in the North Atlantic, including endangered right whales (*Eubalaena glacialis*).

ADDRESSES: The amendment and related documents are available for review

upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9200; fax (978)281–9371; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

FOR FURTHER INFORMATION CONTACT: Dr. Tammy Adams or Ruth Johnson, (301)713–2289.

SUPPLEMENTARY INFORMATION: The requested amendment has been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

On June 23, 1999, notice was published in the **Federal Register** (64 FR 33470) that a request for a permit to conduct research on a variety of cetaceans had been submitted by the above-named individual. The permit, which authorizes harassment of marine mammals in the North Atlantic during close approaches for photo-identification and behavioral observations, was issued on March 10, 2000 (65 FR 14947; March 20, 2000). This minor amendment extends the expiration date for the permit from March 31, 2005 to March 1, 2006. This minor amendment does not authorize harassment of any additional marine mammals. Rather, it allows the permit holder an additional 11 months to complete any research remaining from the previous permit year.

Issuance of this permit amendment, as required by the ESA, was based on a finding that such permit amendment: (1) was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: January 6, 2004.

Patrick Opay,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–526 Filed 1–10–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC).

ACTION: Notice of summary of public comment received regarding proposed amendments to the Manual for Courts-Martial, United States (2002 ed.).

SUMMARY: The JSC is forwarding final proposed amendments to the Manual for Courts-Martial, United States (2002 ed.) (MCM) to the Department of Defense. The proposed changes, resulting from the JSC's 2004 annual review of the MCM, concern the rules of procedure applicable in trials by courts-martial. The proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, ''Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon,'' May 21, 1964, and do not constitute the official position of the Department of Defense, the Military Departments, or any other government agency.

This notice is provided in accordance with DoD Directive 5500.17, ''Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' May 3, 2003. This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

In accordance with paragraph III.B.4 of the Internal Organization and Operating Procedures of the JSC, the committee also invites members of the public to suggest changes to the Manual for Courts-Martial in accordance with the described format.

ADDRESSES: Comments and materials received from the public are available for inspection or copying at the Office of the Judge Advocate General (Code 20), 716 Sicard St., SE., Suite 1000, Washington, DC 20374–5047, between 8 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander James Carsten, Executive Secretary, Joint Service Committee on Military Justice, Office of the Judge Advocate General, 716 Sicard St., SE., Suite 1000, Washington, DC 20374–5047, (202) 685–7298, (202) 685–7687 fax.

SUPPLEMENTARY INFORMATION:

Background

On 15 September 2004, the JSC published a Notice of Proposed Amendments to the Manual for Courts-Martial and a Notice of Public Meeting to receive comment on its 2004 draft annual review of the Manual for Courts-Martial. On 15 October 2004, the public meeting was held. Five individuals attended the public meeting and provided oral comment. The JSC received sixteen letters commenting on the proposed amendments.

Purpose

The proposed changes concern the rules of procedure applicable in trials by courts-martial. More specifically, the proposed changes: Amend Rules of Court-Martial and other provisions of the Manual to allow for remote testimony for certain Article 39(a), UCMJ sessions and presentencing witnesses; add the Manual for Courts-Martial provisions for newly enacted Article 119a, Death or Injury to an Unborn Child, enacted on 1 April 2004 in the Unborn Victims of Violence Act of 2004; and the addition of a new Article 134 offense of Patronizing a Prostitute.

Discussion of Comments and Changes

In response to the request for public comment the JSC received oral and written comments. The JSC considered the public comments and, after making some minor amendments, is satisfied that the proposed amendments are appropriate to implement without additional modification. The JSC will forward the public comments and the proposed amendments to the Department of Defense.

Summaries of the oral and written comments regarding the proposed substantive changes follow:

a. In two submissions, one commentator objected to the remote testimony amendments to the Rules of Courts-Martial. The commentator objected, in part, because the commentator perceived that no rationale was provided for the proposed amendments. The commentator also considered the proposed amendments to be deleterious to the military justice system.

b. Three comments were received regarding the JSC proposed Manual provisions for the new Article 119a, Death or Injury to an Unborn Child. Most of the comments highlighted the fact that the statutory language may create some practical difficulties when an actual prosecution takes place under this provision. Other comments suggested creating a definition of

''woman'' for this specific article and adding certain language to the draft elements to make them more consistent with current practices. The JSC agreed and made amendments consistent with the comment on a definition of the term ''woman'' and to add Manual-consistent language to the draft specifications. One comment indicated that the JSC has proposed MCM provisions for this new criminal statute which are not completely consistent with the legislative language and intent.

c. The majority of comments received addressed the ''Patronizing a Prostitute'' offense which the JSC is recommending be added to paragraph 97 of Article 134, UCMJ. Those opposed to the JSC recommendation questioned the need for such an offense, for a variety of reasons including the impact on morale, the negative effects on the health of the service members, and the potential for this offense to be exploited by adversaries of the United States. In addition, some expressed concern regarding the manner in which the offense might ultimately be enforced. Those supporting the JSC recommendation believed it was both appropriate and long overdue. Neither those opposed to the JSC recommendation, nor those in support, provided specific technical amendments to the recommendation. One comment did indicate that no rationale was provided for the proposed amendments and thus it was difficult to ascertain why the amendments were being proposed.

Proposed Amendments After Consideration of Public Comment Received

The proposed amendments to the Manual for Courts-Martial are as follows:

Amend RCM 703(b)(1) by inserting the following three sentences after the last sentence in RCM 703(b)(1):

With the consent of both the accused and Government, the military judge may authorize any witness to testify via remote means. Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance. Factors to be considered include, but are not limited to the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the interlocutory proceeding that may be caused by the production of the witness, the willingness of the witness to testify in person, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training, and for child witnesses the traumatic effect of providing in-court testimony.

Add a new paragraph to the end of the Discussion which follows R.C.M. (b)(1) that reads:

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B.

Amend the Analysis accompanying R.C.M. 703(b) by inserting the following paragraph:

''200__ Amendment: Subsection (b)(1) was amended to allow, under certain circumstances, the utilization of various types of remote testimony in lieu of the personal appearance of the witness.''

Amend the discussion to R.C.M. 802 by amending the last sentence of the discussion to read:

A conference may be conducted by remote means or similar technology consistent with the definition in R.C.M. 914B.

Amend R.C.M. 804(c)(2) to read:

(2) *Procedure.* The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, transmission of the testimony will include a system which will transmit the accused's image and voice into the courtroom from a remote location as well as transmission of the child's testimony from the courtroom to the accused's location. A one-way transmission may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

Amend the Analysis accompanying R.C.M. 804(c) by inserting the following paragraph:

''200__ Amendment: The specific terminology of the manner in which remote live testimony may be transmitted was deleted to allow for technological advances in the methods used to transmit audio and visual information.''

Amend RCM 914A by deleting the third sentence of paragraph (a), which read, ''However, such testimony should normally be taken via a two-way closed circuit television system'' leaving the remaining paragraph which reads:

(a) *General procedures.* A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. At a minimum, the following procedures shall be observed:

Amend RCM 914A by re-lettering current paragraph ''(b)'' to paragraph ''(c)'' and inserting new paragraph (b) which will read:

(b) *Definition.* As used in this rule, ''remote live testimony'' includes, but is not limited to, testimony by video-teleconference, closed circuit television, or similar techology.

Add a discussion section that reads:

For purposes of this rule, unlike R.C.M. 914B, remote means or similar technology does not include receiving testimony by telephone where the parties cannot see and hear each other.

Amend the Analysis accompanying R.C.M. 914A by inserting the following paragraph:

''200__ Amendment: The rule was amended to allow for technological advances in the methods used to transmit audio and visual information.''

Add new Rule R.C.M. 914B, which will read:

Rule 914B. Use of Remote Testimony

(a) *General procedure.*The military judge shall determine the procedures used to take testimony via remote means. At a minimum, all parties shall be able to hear each other, those in attendance at the remote site shall be identified, and the accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Definition.* As used in this rule, testimony via ''remote means'' includes, but is not limited to, testimony by video-teleconference, closed circuit television, telephone, or similar technology.

Discussion

This rule applies for all witness testimony other than child witness testimony specifically covered by M.R.E. 611(d) and R.C.M. 914A. When utilizing testimony via remote means, military justice practitioners are encouraged to consult the procedure used in *In re San Juan Dupont Plaza Hotel Fire Litigation*, 129 F.R.D. 424 (D.P.R. 1989) and to read *United States* v. *Shabazz*, 52 M.J. 585 (N.M.Ct. Crim. App. 1999); and *United States* v. *Gigante*, 166 F.3d 75 (2d Cir. 1999), *cert denied*, 528 U.S. 1114 (2000).

Add a new analysis section for R.C.M. 914B by inserting the following title and paragraph:

''Rule 914B. Use of Remote Testimony

''200__Amendment: This rule describes the basic procedures that will

be used when testimony of any witnesses, other than child witnesses pursuant to R.C.M. 914A, is received via remote means.''

Amend R.C.M 1001.(e)(2)(D) by deleting the ''or'' before ''former testimony'' and inserting '', or testimony by remote means'' after ''former testimony'' so the paragraph reads as follows:

(D) Other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

Add new Discussion paragraph immediately following R.C.M. 1001(e)(2)(E) which will read:

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B.

Amend the Analysis accompanying R.C.M. 1001(e) by inserting the following paragraph:

''200__ Amendment: Subsection (e)(2)(D) was amended to allow the availability of various types of remote testimony to be a factor to consider in whether a presentencing witness must be phyically produced.''

Amend Part IV, Punitive Articles, paragraph 4(c)(6) by inserting the following new subparagraph (f) and redesignating the existing subparagraph (f) as (g):

''(f) Article 119a—attempting to kill an unborn child''

Amend Appendix 23, Analysis of Punitive Articles

''200__ Amendment: In 4(c)(6), subparagraph (f) was redesignated as subparagraph (g) and a new subparagraph (f) was added to reflect the offense of attempting to kill an unborn child as established by the Unforn Victims of Violence Act of 2004, Pub. L. No. 108–212, § 3, __ Stat. __, __ (2004) (art. 119a).

Amend Part IV, Punitive Articles, by inserting the new paragraph 44a to read:

44a. Article 119a—Death or Injury of an Unborn child

a. Text.

''(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section and shall, upon conviction, be punished by such punishment, other than death, as court-martial may direct, which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother.

(2) An offense under this section does not require proof that—

(i) the person engage in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the accused intended to cause the death of, or bodily injury to, the unborn child.

(3) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall, instead of being punished under paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

(4) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

(b) The provisions referred to in subsection (a)are sections 918, 919(a), 919(b) (2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128),

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) As used in this section, the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.''

b. *Elements.*

(1) *Injuring an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b) (2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)) of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

(b) That the woman was then pregnant; and

(c) That the accused thereby caused bodily injury to the unborn child of that woman.

(2) *Killing an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] a woman; and

(b) That the woman was then pregnant; and

(c) That the accused thereby caused the death of the unborn child of that woman.

(3) *Attempting to kill an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman; and

(b) That the woman was then pregnant; and

(c) That the accused thereby attempted to kill the unborn child of that woman.

(4) *Intentionally killing an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(b)(2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman; and

(b) That the woman was then pregnant; and

(c) That the accused thereby intentionally killed the unborn child of that woman.

c. *Explanation.*

(1) *Nature of offense.* This article makes it a separate, punishable crime to cause the death of or bodily injury to an unborn child while engaged in arson (article 126, UCMJ) murder (article 118, UCMJ); voluntary manslaughter (article 119(a), UCMJ); involuntary manslaughter (article 119(b)(2), UCMJ; rape (article 120(a), UCMJ); robbery (article 122, UCMJ); maiming (article 124, UCMJ); or assault (article 128, UCMJ) against a pregnant woman. For all underlying offenses, except arson, this article requires that the victim of the underlying offense be the pregnant mother. For purposes of arson, the pregnant mother must have some nexus

to the arson such that she sustained some ''bodily unjury'' due to the arson. For the purposes of this article the term ''women'' means a female of any age. This article does not permit the prosecution of any—

(i) person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(ii) person for any medical treatment of the pregnant woman or her unborn child; or

(iii) woman with respect to her unborn child.

The offenses of ''injuring an unborn child'' and ''killing an unborn child'' do not require proof that—

(i) the person engaging in the conduct (the accused) had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the accused intended to cause the death of, or bodily injury to, the unborn child.

(2) *Bodily injury.* For the purpose of this offense, the term ''bodily injury'' is that which is provided by 18 U.S.C. § 1365, to wit: a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.

(3) *Unborn child.* ''Unborn child'' means a child in utero or a member of the species homo sapiens who is carried in the womb, at any stage of development, from conception to birth.

d. *Lesser included offenses.*

(1) *Killing an unborn child.*

(a) Article 119a—injuring an unborn child

(2) *Intentionally killing an unborn child.*

(a) Article 119a—killing an unborn child

(b) Article 119a—injuring an unborn child

(c) Article 119a—attempts (attempting to kill an unborn child)

e. *Maximum punishment.*

The maximum punishment for (1) Injuring an unborn child; (2) Killing an unborn child; (3) Attempting to kill an unborn child; or (4) Intentionally killing an unborn child is such punishment, other than death, as a court-martial may direct, but shall be consistent with the punishment had the injury, death, attempt to kill or intentional killing occurred to the unborn child's mother.

f. *Sample specifications.*

(1) *Injuring an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, cause bodily injury to the unborn child of _____, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(2) *Killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, cause the death to the unborn child of _____, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(2) *Killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, cause the death to the unborn child of _____, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(3) *Attempting to kill an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, attempt to kill the unborn child of _____, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(4) *Intentionally killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, intentionally kill the unborn child of _____, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

Amend Appendix 12, maximum Punishment Chart by inserting the following before Article 120, rape:

119a Death or Injury of an Unborn Child

Injuring or killing an unborn child Article 119a * * * Such punishment, other than death, as a court-martial may direct but such punishment shall be consistent with the punishment had the bodily injury or death occurred to the unborn child's mother.

Attempting to kill an unborn child Article 119a * * * Such punishment, other than death, as a court-martial may direct but such punishment shall be consistent with the punishment had the attempt been made to kill the unborn child's mother.

Intentional killing an unborn child Article 119a * * * Such punishment, other than death, as a court-martial may direct but such punishment shall be consistent with the punishment had the killing occurred to the unborn child's mother.

Amend Appendix 23, Analysis of Punitive Articles by adding the following new analysis:

44a. Article 119a—(Death or Injury of an Unborn Child)

(c) *Explanation.* This paragraph is new and is based on Public Law 108–212, 18 U.S.C. 1841 and 10 U.S.C. 919a (Unborn Victims of Violence Act of 2004) enacted on 1 April 2004.

Amend paragraph 97, Article 134—(Pandering and prostitution) to add the new offense of patronizing a prostitute. The Article as amended will read:

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Prostitution.*

(a) That the accused had sexual intercourse with another person not the accused's spouse;

(b) That the accused did so for the purpose of receiving money or other compensation;

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *Patronizing a prostitute.*

(a) That the accused had sexual intercourse with another person not the accused's spouse;

(b) That the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation; and

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) *Pandering by compelling, inducing, enticing, or procuring act of prostitution.*

(a) That the accused compelled, induced, enticed, or procured a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused;

(b) That this compelling, inducing, enticing, or procuring was wrongful; and

(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(4) *Pandering by arranging or receiving consideration for arranging for sexual intercourse or sodomy.*

(a) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in sexual intercourse or sodomy with another person;

(b) That the arranging (and receipt of consideration) was wrongful; and

(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* Prostitution may be committed by males or females. Sodomy for money or compensation is not included in subparagraph b(1). Sodomy may be charged under paragraph 51. Evidence that sodomy was for money or compensation may be a matter in aggravation. See R.C.M. 1001(b)(4).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Prostitution and patronizing a prostitute.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Prostitution.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully engage in (an act) (acts) of sexual intercourse with _____, a person not his/her spouse, for the purpose of receiving (money) (_____).

(2) *Patronizing a prostitute.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (compel) (induce) (entice) (procure _____, a person not his/her spouse, to engage in (an act) (acts) of sexual intercourse with the accused in exchange for (money) (_____).

(3) *Compelling, inducing, enticing, or procuring act of prostitution.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (compel) (induce) (entice) (procure) _____ to engage in (an act) (acts) of (sexual intercourse for hire and reward with persons to be directed to him/her by the said _____.

(4) *Arranging, or receiving consideration for arranging for sexual intercourse or sodomy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ wrongfully (arrange for) (receive valuable consideration, to wit: _____ on account of arranging for—) _____ to engage in (an act) (acts) of (sexual intercourse) (sodomy) with _____.

Amend Appendix 12, Maximum Punishment Chart by substituting ''Prostitution and patronizing a prostitute'' for ''Prostitution.''

Amend Appendix 23, Analysis of Punitive Articles by amending the Analysis accompanying paragraph 97 by adding the following:

''200__Amendment: b. Elements. Subparagraph (2) defines the elements of the offense of patronizing a prostitute. Old subparagraphs (2) and (3) are now (3) and (4) respectively.''

Dated: January 5, 2005.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–457 Filed 1–10–05; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF EDUCATION

[CFDA 84.060A]

Indian Education Formula Grants to Local Education Agencies—Notice Inviting Applications for Fiscal Year (FY) 2005

AGENCY: Office of Indian Education.

Purpose: The Indian Education Formula Grant program provides grants to support local educational agencies (LEAs) and other eligible entities (described elsewhere in this notice) in their efforts to reform and improve elementary and secondary school programs that serve Indian students. The programs funded are to be based on challenging State academic content and student academic achievement standards used for all students, and be designed to assist Indian students to meet those standards. Section 7116 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), also authorizes, upon the Secretary's receipt of an acceptable plan for the integration of education and related services, the consolidation of funds for any Federal program exclusively serving Indian children, or the funds reserved under any Federal program to exclusively serve Indian children, that are awarded under a statutory or administrative formula, for the purposes of providing education and related services that would be used to serve Indian students. Instructions for submitting an integration of services plan are included in the application package.

Eligible Applicants: LEAs, certain schools funded by the Bureau of Indian Affairs and Indian tribes under certain conditions, as prescribed by section 7112(c) of the ESEA.

Applications Available: January 12, 2005.

Deadline for Transmittal of Applications: February 28, 2005.

Applications not meeting the deadline will not be considered for funding in the initial allocation of awards. However, if funds become available after the initial allocation of funds, applications not meeting the deadline may be considered for funding if the Secretary determines, under section 7118(d) of the ESEA, that reallocation of those funds to applicants filing after the deadline would best assist in advancing the purposes of the program. However, the amount and date of an individual award, if any, may be less than the applicant would have received had the application been submitted on time.

Deadline for Intergovernmental Review: May 11, 2005.

Available Funds: $95,165,536.

Estimated Range of Awards: $4,000 to $2,215,000.

Estimated Average Size of Awards: $79,503.

Estimated Number of Awards: 1,197.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months for new applications.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

For Applications or Information Contact: Cathie Martin, Office of Indian Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C152, Washington, DC. 20202–6335. Telephone: (202) 260–3774. An electronic version of the application is available at: *http://www.ed.gov/about/offices/list/ous/oie/index.html.*

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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Program Authority: 20 U.S.C. 7421.

Dated: January 5, 2005.

Victoria Vasques,

Deputy Under Secretary and Director for Indian Education.

[FR Doc. 05–522 Filed 1–10–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP95–408–061]

Columbia Gas Transmission Corporation; Notice of Compliance Filing

January 4, 2005.

Take notice that on December 30, 2004, Columbia Gas Transmission Corporation (Columbia) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets with a proposed date of February 1, 2005:

Seventy-third Revised Sheet No. 25;
Seventy-third Revised Sheet No. 26;
Seventy-third Revised Sheet No. 27;
Sixty-first Revised Sheet No. 28;
Ninth Revised Sheet No. 28B;
Twentieth Revised Sheet No. 29;
Seventh Revised Sheet No. 29A; and
Thirty-third Revised Sheet No. 30A.

Columbia states that this filing is being submitted pursuant to an order issued September 15, 1999 by the Commission's approving an uncontested settlement that resolves environmental cost recovery issues in the above-referenced proceeding. Columbia Gas Transmission Corporation, 88 FERC ¶ 61,217 (1999). The settlement established environmental cost recovery through unit components of base rates, all as more fully set forth in the settlement agreement filed April 5, 1999.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–52 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–518–068]

Gas Transmission Northwest Corporation; Notice of Negotiated Rate

January 4, 2005.

Take notice that on December 27, 2004, Gas Transmission Northwest Corporation (GTN) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1–A, Sixteenth Revised Sheet No. 15, to become effective January 1, 2005.

GTN states that this sheet is being filed to reflect the continuation of a negotiated rate agreement pursuant to evergreen provisions contained in the agreement.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested state regulatory agencies.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and

interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–43 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–513–036]

Questar Pipeline Company; Notice of Negotiated Rates

January 4, 2005.

Take notice that on December 30, 2004, Questar Pipeline Company (Questar) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Eighth Revised Sheet No. 7A, with an effective date of December 30, 2004. Questar states that the tariff filing is being filed to reflect the elimination of a contract expiration date referenced in Footnote No. 3.

Questar further states that it submitted its negotiated-rate filing in accordance with the Commission's Policy Statement in Docket Nos. RM95–6–000 and RM96–7–000 issued January 31, 1996.

Questar states that a copy of this filing has been served upon all parties to this proceeding, Questar's customers, the Public Service Commission of Utah and the Public Service Commission of Wyoming.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–53 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–51–000]

Wisconsin Public Service Corporation v. Midwest Independent Transmission System Operator, Inc.; Notice of Complaint Requesting Fast Track Processing

January 5, 2005.

Take notice that on December 29, 2004, Wisconsin Public Service Corporation (WPSC) tendered for filing a complaint, pursuant to section 206 of the Federal Power Act and Rule 206 of the Commission's regulations, against the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). WPSC requests that the Commission order the Midwest ISO to (1) deny inappropriately allocated FTRs; (2) properly model generation contingencies; and (3) rerun the FTR allocation process to restore WPSC's unlawfully prorated FTRs.

WPSC states that it served a copy of the filing on the respondent.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on January 12, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–60 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–30–000, et al.]

Aquila, Inc., et al.; Electric Rate and Corporate Filings

January 3, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Aquila, Inc. and Aquila Long Term, Inc.

[Docket No. EC05–30–000]

Take notice that on December 28, 2004, Aquila, Inc. and Aquila Long Term, Inc. (collectively, Applicants) tendered for filing an Application for Authorization to Transfer Jurisdictional Facilities to South Mississippi Electric Power Association, pursuant to Part 33 of the Commission's Regulations. Applicants request privileged treatment for Exhibit I of the Application pursuant to section 388.112 and 33.9 of the Commission's regulations.

Comment Date: 5 p.m. eastern time on January 18, 2005.

2. ESI Energy, LLC, Energy National Wind, LLC, Backbone Windpower Holdings, LLC, ESI Vansycle GP, Inc., ESI Vansycle LP, Inc., FPL Energy North Dakota Wind, LLC, FPL Energy North Dakota Wind II, LLC, FPL Energy Oklahoma Wind, LLC, FPL Energy Pennsylvania Wind, LLC, FPL Energy Sooner Wind, LLC, FPL Energy South Dakota Wind, LLC, FPL Energy Waymart GP, LLC, FPL Energy Waymart LP, LLC, FPL Energy Wyoming, LLC, Meyersdale Windpower, LLC and Uinta County Wind Farm L.L.C.

[Docket No. EC05–31–000]

Take notice that on December 29, 2004, ESI Energy, LLC, FPL Energy National Wind, LLC, Backbone Windpower Holdings, LLC, ESI Vansycle GP, Inc., ESI Vansycle LP, Inc., FPL Energy North Dakota Wind, LLC, FPL Energy North Dakota Wind II, LLC, FPL Energy Oklahoma Wind, LLC, FPL Energy Pennsylvania Wind, LLC, FPL Energy Sooner Wind, LLC, FPL Energy South Dakota Wind, LLC, FPL Energy Waymart GP, LLC, FPL Energy Waymart LP, LLC, FPL Energy Wyoming, LLC, Meyersdale Windpower, LLC and Uinta County Wind Farm L.L.C. (jointly, Applicants) pursuant to section 203 of the Federal Power Act, filed a joint application for approval of an intra-corporate reorganization. Applicants state that the proposed reorganization will not change the ultimate ownership of the facilities directly or indirectly owned by the Applicants.

Applicants state that a copy of the application has been served on the public utility commissions in the states where the facilities are located.

Comment Date: 5 p.m. eastern time on January 19, 2005.

3. Puget Sound Energy, Inc.; Encogen Northwest, L.P.

[Docket No. EC05–32–000]

Take notice that on December 29, 2004, Puget Sound Energy, Inc. (Puget) and Encogen Northwest, L.P. (Encogen) filed with the Federal Energy Regulatory Commission, pursuant to section 203 of the Federal Power Act, a Request for Authorization to Transfer Jurisdictional Assets with respect to the transfer to Puget of Encogen's 170 MW cogenerating facility located in Bellingham, Washington.

Comment Date: 5 p.m. eastern time on January 19, 2005.

4. SE Holdings, LLC

[Docket No. ER96–3107–014]

Take notice that on December 20, 2004, Strategic Energy, LLC submitted a Notification of Change in Status that reflects a departure from the facts relied upon by the Commission in granting market-based rate authority.

Comment Date: 5 p.m. eastern time on January 10, 2005.

5. Millennium Power Partners, L.P.

[Docket Nos. ER98–830–010 and ER05–397–000]

Take notice that on December 22, 2004, Millennium Power Partners, L.P. (Millennium) submitted its triennial market power report pursuant to *Acadia Power Partners, LLC, et al.,* 107 FERC ¶ 61,168 (2004), as well as its revised Market-Based Rate Tariff to incorporate the Market Behavior Rules as required by the Commission and to allow for the (1) sale of Ancillary Services; (2) resale of Firm Transmission Rights, Transmission Congestion Contracts, Fixed Transmission Rights, Auction Revenue Rights, or similar instruments; and (3) reassignment of transmission capacity.

Millennium states that copies of the filing were served on parties on the official service list for Docket No. ER98–830.

Comment Date: 5 p.m. eastern time on January 12, 2005.

6. Kincaid Generation, L.L.C.

[Docket No. ER99–1432–004]

Take notice that on December 28, 2004, Kincaid Generation, L.L.C. (KGL) tendered for filing revised tariff sheets to its market-based rate tariff, FERC Electric Tariff, Second Revised Volume No. 1, to change the issuing officer and to correct the corporate name in the header and footer. KGL requests an effective date of December 17, 2003.

KGL states that copies of the filing were served upon the public utility's jurisdictional customers and Virginia State Corporation Commission, Ohio Public Utilities Commission, the Public Service Commission of West Virginia and the Pennsylvania Public Service Commission.

Comment Date: 5 p.m. eastern time on January 18, 2005.

7. American Ref-Fuel Company of Niagara, L.P.

[Docket No. ER01–1302–004]

Take notice that on December 29, 2004, American Ref-Fuel Company of Niagara, L.P. (ARC-Niagara) tendered for filing a triennial market power analysis pursuant to the Commission's order granting ARC-Niagara market-based rate authority.

ARC-Niagara states that a copy of this filing was served on the New York State Public Service Commission.

Comment Date: 5 p.m. eastern time on January 19, 2005.

8. In the matter of: ER02–2559–002, ER01–1071–003, ER02–669–004, ER02–2018–004, ER01–2074–003, ER90–80–002, ER98–2494–005, ER97–3359–006, ER00–3068–003, ER03–34–002, ER98–3511–007, ER02–1903–003, ER98–3562–007, ER99–2917–004, ER03–179–004, ER02–2166–003, ER98–3566–010, ER02–1838–003, ER01–838–003, ER98–3563–007, ER98–3564–007, ER01–1972–003, ER98–2076–006, ER03–155–003, ER03–623–003, ER98–4222–002, ER01–1710–003, ER01–2139–004, and ER98–1965–003; Backbone Mountain Windpower, LLC, Badger Windpower, LLC, Bayswater Peaking Facility, LLC, Blythe Energy, LLC, Calhoun Power Company I, LLC, Doswell Limited Partnership, ESI Vansycle Partners, L.P., Florida Power & Light Co., FPL Energy Cape, LLC, FPL Energy Hancock County Wind, LLC, FPL Energy Maine Hydro, Inc., FPL Energy Marcus Hook, L.P., FPL Energy Mason, LLC, FPL Energy MH 50, LP, FPL Energy New Mexico Wind, LLC, FPL Energy Pennsylvania Wind, LLC, FPL Energy Power Marketing, Inc., FPL Energy Seabrook, LLC, FPL Energy Vansycle, LLC, FPL Energy Wyman, LLC, FPL Energy Wyman IV, LLC, Gray County Wind Energy, LLC, Hawkeye Power Partners, LLC, High Winds, LLC, Jamaica Bay Peaking Facility, LLC, Lake Benton Power Partners II, LLC, Mill Run Windpower, LLC, Somerset Windpower, LLC, and West Texas Wind Energy Partners, LP.

Take notice that, on December 22, 2004, Backbone Mountain Windpower, LLC, Badger Windpower, LLC, Bayswater Peaking Facility, LLC, Blythe Energy, LLC, Calhoun Power Company

I, LLC, Doswell Limited Partnership, ESI Vansycle Partners, L.P., Florida Power & Light Company, FPL Energy Cape, LLC, FPL Energy Hancock County Wind, LLC, FPL Energy Maine Hydro, Inc., FPL Energy Marcus Hook, L.P., FPL Energy Mason, LLC, FPL Energy MH 50, LP, FPL Energy New Mexico Wind, LLC, FPL Energy Pennsylvania Wind, LLC, FPL Energy Power Marketing, Inc., FPL Energy Rhode Island Energy, L.P., FPL Energy Seabrook, LLC, FPL Energy Vansycle, LLC, FPL Energy Wyman, LLC, FPL Energy Wyman IV, LLC, Gray County Wind Energy, LLC, Hawkeye Power Partners, LLC, High Winds, LLC, Jamaica Bay Peaking Facility, LLC, Lake Benton Power Partners II, LLC, Mill Run Windpower, LLC, Somerset Windpower, LLC, and West Texas Wind Energy Partners, LP (collectively, Applicants) submitted a revised market-based rate three-year update filing pursuant to the Commission Order Implementing New Generation Market Power Analysis and Mitigation Procedures, issued May 13, 2004 in Docket Nos. ER04–1406–001, *et al.*, 107 FERC ¶ 61,168 (2004).

Applicants state that copies of the filing were served on parties on the official service list in the above-captioned proceedings, the Florida Public Service Commission and the New Hampshire Public Utilities Commission.

Comment Date: 5 p.m. eastern time on January 12, 2005.

9. Delmarva Power & Light Company

[Docket Nos. ER04–509–003, and ER04–1250–002]

Take notice that on December 29, 2004, Delmarva Power & Light Company (Delmarva), tendered for filing an amendment to its September 24, 2004 filing in Docket Nos. ER04–509–001 and ER04–1250–000. Delmarva states that the amendment was filed in response to a deficiency letter regarding the September 24, 2004 filing issued on November 23, 2004.

Comment Date: 5 p.m. eastern time on January 19, 2005.

10. California Independent System Operator Corporation

[Docket No. ER05–333–000]

Take notice that on December 14, 2004, the California Independent System Operator Corporation (ISO) tendered for filing an amended and restated NCPA MSS Aggregator Agreement (MSSAA) between the ISO and Northern California Power Agency (NCPA). The ISO requests privileged treatment of portions of the filing. The ISO is requesting an effective date of January 1, 2005.

The ISO states that the non-privileged elements of this filing have been served on NCPA, the California Public Utilities Commission, the California Electricity Oversight Board, and all entities that are on the official service lists for Docket Nos. ER02–2321, ER03–1119, ER04–1020, and ER04–690.

Comment Date: 5 p.m. eastern time on January 13, 2005.

11. Northeast Utilities Service Company

[Docket No. ER05–385–000]

Take notice that on December 28, 2004, Northeast Utilities Service Company (NUSCO), on behalf of The Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company and Public Service Company of New Hampshire, submitted a Notice of Cancellation of the rate schedules for sales of electricity to the Town of Danvers Electric Division (Danvers), Littleton Electric Light Department (Littleton), Mansfield Municipal Electric Department (Mansfield), and UNITIL Power Corporation (UNITIL). NUSCO requests that the rate schedule terminations be effective as of October 31, 2004, the date on which the rate schedules terminated by their own terms.

NUSCO states that a copy of this filing has been mailed to Danvers, Littleton, Mansfield, UNITIL, and Select Energy, Inc.

Comment Date: 5 p.m. eastern time on January 18, 2005.

12. PJM Interconnection, L.L.C.

[Docket No. ER05–387–000]

Take notice that on December 28, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interim interconnection service agreement among PJM, Conectiv Delmarva Generation, Inc., and Delmarva Power & Light Company d/b/a Conectiv Power Delivery. PJM requests an effective date of November 30, 2004.

PJM states that copies of this filing were served upon the parties to the agreement and the state regulatory commissions within the PJM region.

Comment Date: 5 p.m. eastern time on January 18, 2005.

13. PJM Interconnection, L.L.C.

[Docket No. ER05–388–000]

Take notice that on December 28, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interim interconnection service agreement (Interim ISA) among PJM, Conectiv Delmarva Generation, Inc., and Delmarva Power & Light Company d/b/a Conectiv Power Delivery. PJM requests an effective date of November 30, 2004.

PJM states that copies of this filing were served upon the parties to the agreement and the state regulatory commissions within the PJM region.

Comment Date: 5 p.m. eastern time on January 18, 2005.

14. PJM Interconnection, L.L.C.

[Docket No. ER05–389–000]

Take notice that on December 28, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interim interconnection service agreement among PJM, Exelon Generation Company L.L.C., and PECO Energy Company, designated as Original Service Agreement No. 1198 under PJM's FERC Electric Tariff, Sixth Revised Volume No. 1. PJM requests an effective date of November 29, 2004.

PJM states that copies of this filing were served upon the parties to the agreement and the state regulatory commissions within the PJM region.

Comment Date: 5 p.m. eastern time on January 18, 2005.

15. Pacific Gas and Electric Company

[Docket No. ER05–390–000]

Take notice that on December 29, 2004, Pacific Gas and Electric Company (PG&E) submitted a Revised Interconnection Agreement between PG&E and the Turlock Irrigation District (TID) designated as Pacific Gas and Electric Company, Second Revised Rate Schedule FERC No. 213. PG&E requests an effective date of March 1, 2005.

PG&E states that copies of the filing were served upon the TID, the California Public Utilities Commission and the California Independent System Operator Corporation.

Comment Date: 5 p.m. eastern time on January 19, 2005.

16. Progress Ventures, Inc.

[Docket No. ER05–391–000]

Take notice that on December 29, 2004, Progress Ventures, Inc. (Progress Ventures) submitted a Cost-based Sales Tariff for Short-term Sales of Capacity and Energy, designated as Progress Ventures, Inc., FERC Electric Tariff, Original Volume No. 2. Progress Ventures requests an effective date of June 14, 2004.

Progress Ventures states that copies of the filing were served upon the Florida Public Service Commission, the North Carolina Utilities Commission and affected customers.

Comment Date: 5 p.m. eastern time on January 19, 2005.

17. American Electric Power Service Corporation

[Docket No. ER05–392–000]

Take notice that on December 29, 2004, the American Electric Power Service Corporation (AEPSC), tendered for filing an Interconnection and Local Delivery Service Agreement designated as Original Service Agreement No. 621, under the Operating Companies of the American Electric Power System's FERC Electric Tariff, Third Revised Volume No. 6. AEPSC requests an effective date of December 1, 2004.

Comment Date: 5 p.m. eastern time on January 19, 2005.

18. El Paso Electric Company Public Service, Company of New Mexico and Texas-New Mexico Power Company

[Docket No. ER05–393–000]

Take notice that on December 29, 2004, El Paso Electric Company, Public Service Company of New Mexico, and Texas-New Mexico Power Company (collectively, the Parties) submitted the New Mexico Transmission Operating Procedures and First Revised Restated Letter of Understanding. The Parties request an effective date of January 1, 2005.

The Parties state that copies of the agreement were served on Tri-State Generation and Transmission Association, Inc., the only other party to the agreements.

Comment Date: 5 p.m. eastern time on January 19, 2005.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–55 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2232–455]

Duke Power Company; Notice of Availability of Environmental Assessment

January 4, 2005.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's (Commission) regulations (18 CFR part 380), Commission staff have prepared an environmental assessment (EA) that analyzes the environmental impacts of allowing Duke Power Company, licensee for the Catawba-Wateree Hydroelectric Project, to grant a lease of two parcels of land, totaling 1.918 acres, to Lake James Properties, LLC, for the purpose of constructing a residential/commercial marina. The marina will be located on Lake James, one of the project's 11 reservoirs, in McDowell County, North Carolina. The facility will accommodate a total of 110 boat slips, and will provide access to the reservoir for the residents of The Arbor on Lake James subdivision.

A copy of the EA is attached to a Commission order titled ''Order Modifying and Approving Non-Project Use of Project Lands and Waters,'' which was issued on December 15, 2004, and is available for review and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''elibrary'' link. Enter the docket number (prefaced by P-) and excluding the last three digits, in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–44 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 20–038]

PacifiCorp; Notice of Application for Temporary Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

January 4, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Request to temporarily amend the minimum flow requirements of article 408 of the project license.

b. *Project Number:* P–20–038.

c. *Date Filed:* December 12, 2004.

d. *Applicant:* PacifiCorp.

e. *Name of Project:* Bear River Hydroelectric Project (FERC No. 20).

f. *Location:* The project is located on the Bear River in Caribou and Franklin Counties, Idaho.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a) 825(r) and 799 and 801.

h. *Applicant Contacts:* Monte Garrett, 825 NE. Multnomah, Suite 1500, Portland, OR 97232. Phone: (503) 813–6629.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Robert Fletcher at (202) 502–8901, or e-mail address: *robert.fletcher@ferc.gov*.

j. *Deadline for filing comments and or motions:* February 7, 2005.

k. *Description of Request:* The parties to the Bear River Settlement Agreement, which include PacifiCorp, U.S. Fish and Wildlife Service, U.S. Bureau of Land Management, National Park Service, U.S. Forest Service, Shoshone-Bannock Tribes, Idaho Department of Environmental Quality, Idaho Department of Fish and Game, Idaho Department of Parks and Recreation, Idaho Council of Trout Unlimited, Idaho Rivers United, Greater Yellowstone Coalition, and American Whitewater, propose to amend the Bear River Settlement Agreement to include the forthcoming Cove Agreement and

license amendment application which the licensee will file with the Commission for approval to decommission the Cove project and amend article 408 of the project license to reduce the minimum instream flow requirement in the Grace bypassed reach from 80 cubic feet per second (cfs) to 65 cfs. Currently, the licensee, on behalf of the settlement parties, requests that a temporary amendment to article 408 be given upon the Commission's receipt of the amendment application (to be filed with the Commission by April 2005) that will allow the minimum flow requirement to be reduced from 80 cfs to 65 cfs during the time that the Commission is conducting its analysis to reach a decision on the amendment application. The temporary amendment will be necessary to permit the settlement parties to conduct aquatic habitat assessments, beginning in May 2005.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers (p–20–038). All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E5–54 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. PL04–14–000, ER03–1141–004, EL03–222–004, EL04–102–004, EL04–102–005, EL04–102–007, EL04–102–008, ER03–563–025, ER03–563–027, ER03–563–033, ER03–563–036, ER03–563–043, ER03–563–044, ER03–563–045, ER03–563–047, ER03–563–048, ER04–464–002, ER04–464–005, ER04–464–006, ER04–344–001, ER02–2463–004, ER02–2330–031, ER02–2330–032, RT04–2–006, RT04–2–007, RT04–2–008, RT04–2–009, ER04–116–006, ER04–116–007, ER04–116–008, ER04–116–009, ER04–157–008, ER04–157–009, ER04–157–011, EL01–39–006, EL01–39–007, EL01–39–008, EL01–39–009]

Connecticut Transmission Infrastructure; New England Power Pool and ISO New England, Inc., et al.; Devon Power LLC, et al.; Exelon New Boston LLC; ISO New England, Inc.; ISO New England, Inc. and Bangor Hydro, et al.; Notice of Technical Conference

January 3, 2005.

In a Notice of Technical Conference issued October 29, 2004, the Federal Energy Regulatory Commission announced that it would host a technical conference on Thursday, January 6, 2005, to discuss specific transmission proposals and cost issues for the State of Connecticut. The conference will be held in Room 2C of the Legislative Office Building, 300 Capitol Avenue, Hartford, Connecticut.

Please take note that the workshop schedule has changed, to begin at 10 a.m. (EST) (instead of 9 a.m.) and end at approximately 1 p.m. (instead of 3 p.m.). Members of the Federal Energy Regulatory Commission are expected to participate, along with state regulators from the New England region. An agenda is attached to this notice.

This conference is a follow-up to the infrastructure conference that was held on October 13, 2004. The goal of this technical conference is to provide a forum for discussion of issues affecting energy infrastructure in and around Connecticut. This discussion will take place between federal, State and regional leaders and industry representatives. The January 6 conference will focus primarily on proposals for new electric transmission, and the costs of these proposals.

The conference is a technical discussion between policy leaders, however, members of the public are welcome to attend. Registration is not required; however, in-person attendees are asked to register for the conference on-line by close of business on Tuesday,

January 4, 2005 at *http://www.ferc.gov/whats-new/registration/infra-0106-form.asp.*

Transcripts of the conference will be immediately available from Ace Reporting Company (202–347–3700 or 1–800–336–6646) for a fee. They will be available for the public on the Commission's eLibrary system seven calendar days after FERC receives the transcript. Additionally, Capitol Connection offers the opportunity for remote listening of the conference via Real Audio or a Phone Bridge Connection for a fee. Persons interested in making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703–993–3100) as soon as possible or visit the Capitol Connection Web site at *http://www.capitolconnection.org* and click on ''FERC.''

For more information about the conference, please contact Sarah McKinley at 202–502–8004, *sarah.mckinley@ferc.gov.*

Magalie R. Salas,

Secretary.

Addenda A

Agenda—Technical Conference on Connecticut Infrastructure; Thursday, January 6, 2005; Hartford, Connecticut; 10 a.m. to 1 p.m.

Opening Comments

Chairman Pat Wood, III, Federal Energy Regulatory Commission.

Chairman Donald W. Downes, Connecticut Department of Public Utility Control.

Review of Issues

David H. Boguslawski, Vice President, Transmission Business, Northeast Utilities Service Company.

Scope and Findings of the Investigations

Stephen G. Whitley, Senior Vice President and Chief Operating Officer, ISO New England, Inc.

Solutions Before the Siting Council

John J. Prete, Project Director/General Manager and Vice President, United Illuminating.

Cost Comparisons of Solutions

Anne Bartosewicz, Transmission Project Director, Northeast Utilities System.

Reliability Benefits

Stephen G. Whitley, Senior Vice President and Chief Operating Officer, ISO New England, Inc.

Process Going Forward for Determining Cost Allocation

Stephen G. Whitley, Senior Vice President and Chief Operating Officer, ISO New England, Inc.

Summary

David H. Boguslawski, Vice President, Transmission Business, Northeast Utilities Service Company.

[FR Doc. E5–45 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. PR04–15–000, PR04–16–000, PR02–10–005]

Enogex Inc.; Notice of Technical Conference

January 4, 2005.

Take notice that a technical conference in the above captioned proceedings will be held on Thursday, January 13, 2005 at 9:30 a.m. (e.s.t.), in a room to be designated at the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The technical conference will deal with issues raised in the referenced proceedings (Docket Nos. PR04–15–000, PR04–16–000, PR02–10–005). These include, but are not limited to: the fairness and equitableness of Enogex's new priority procedure for interruptible transportation; the classification of costs between gathering and transmission; and a range of other cost of service issues associated with Enogex's three year general rate filing.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or 202–208–01659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

All interested parties and staff are permitted to attend.

Magalie R. Salas,

Secretary.

[FR Doc. E5–51 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR00–9–004]

Gulfterra Texas Pipeline, LP; Notice of Cancellation of Technical Conference

January 4, 2005.

Take notice that the Technical Conference scheduled for Thursday, January 6, 2005 at 1:30 p.m. (e.s.t.), at the Federal Energy Regulatory Commission's Headquarters has been canceled.

Magalie R. Salas,

Secretary.

[FR Doc. E5–46 Filed 1–10–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7860–6]

Science Advisory Board (SAB) Staff Office; Notification of Upcoming Meetings of the Science Advisory Board Metals Risk Assessment Framework Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA's Science Advisory Board (SAB) Staff Office is announcing a public teleconference and meeting of the SAB Metals Risk Assessment Framework Review Panel (Panel).

DATES: January 26, 2005: The Panel will hold a public teleconference on January 26, 2005, from 11 a.m. to 2 p.m. (EST).

February 1–3, 2005: The Panel will hold a public face-to-face meeting starting February 1, 2005, at 9 a.m., adjourning at approximately 3 p.m. (EST) on February 3, 2005.

ADDRESSES: The public teleconference will take place via telephone only. The public face-to-face meeting of the Panel will be held at the Science Advisory Board Conference Center located at 1025 F Street, NW., Room 3705, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding the public teleconference and meeting may contact Dr. Thomas Armitage, Designated Federal Officer (DFO), U.S. EPA Science Advisory Board by telephone/voice mail at (202) 343–9995, fax at (202) 233–0643, by e-mail at *armitage.thomas@epa.gov*, or by mail at U.S. EPA SAB (1400F), 1200 Pennsylvania Ave., NW., Washington, DC 20460. General information about the SAB and the meeting location may be found on the SAB Web site, *http://www.epa.sab.*

For technical inquiries concerning EPA's Framework for Inorganic Metals Risk Assessment, please contact Dr. William Wood, U.S. EPA Office of Research and Development, Risk Assessment Forum by telephone/voice mail at (202) 564–3361, fax at (202) 564–0062, by e-mail at *forum.risk@epa.gov* or

by mail at Office of Research and Development, Risk Assessment Forum (8601–D), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: *Summary:* Pursuant to the Federal Advisory Committee Act, Public Law 92–463, Notice is hereby given that the Panel will hold a public teleconference and meeting to conduct a peer review of EPA's Framework for Inorganic Metals Risk Assessment. The dates and times for the teleconference and meeting are provided above.

Background: Background on the meeting described in this notice was provided in a **Federal Register** Notice published on July 29, 2004 (69 FR 45314–45315). EPA has been undertaking an effort to develop cross-Agency guidance for assessing the human health and ecological hazards and risks of metals and metal compounds. EPA developed the draft guidance document entitled, ''Framework for Inorganic Metals Risk Assessment,'' to supplement previous EPA guidance for use in site-specific risk assessments, criteria derivation, and other similar Agency activities related to metals. The guidance is organized around the risk assessment paradigm. The document provides a conceptual model that highlights areas where consideration of metal-specific information is necessary and advantageous when conducting risk assessments. It outlines recommendations for conducting risk assessment for metals and metal compounds based on the unique attributes of these compounds. The guidance document also discusses metal-specific issues related to environmental chemistry, exposure, bioaccumulation and bioavailability, ecological effects, and human health effects. In addition, the guidance discusses research underway, planned, and needed to reduce uncertainty in metals risk assessment.

The Panel will meet with Agency Program representatives by teleconference prior to the face-to-face meeting to discuss charge questions and ask clarifying questions about the Framework for Inorganic Metals Risk Assessment. At the face-to-face meeting, the Panel will conduct a peer review of the Framework for Inorganic Metals Risk Assessment.

Availability of Meeting Materials: A roster of Panel members, their biosketches, the charge to the SAB panel, and the meeting agendas will be posted on the SAB Web site prior to the meetings. EPA's Framework for Metals Risk Assessment may be found at: *http://cfpub2.epa.gov/ncea/raf/recordisplay.cfm?deid=88903.*

Procedures for Providing Public Comments: It is the policy of the EPA Science Advisory Board (SAB) to accept written public comments of any length, and to accommodate oral public comments whenever possible. The SAB Staff Office expects that public statements presented at SAB Metals Risk Assessment Review Panel meetings will not be repetitive of previously submitted oral or written statements. Oral Comments: In general, each individual or group requesting an oral presentation at a face-to-face meeting will be limited to a total time of ten minutes (unless otherwise indicated). In general, for teleconference meetings, opportunities for oral comment will be limited to no more than three minutes per speaker and no more than fifteen minutes total. Interested parties should contact the DFO in writing (e-mail, fax or mail—see contact information above) by close of business January 19, 2004 in order to be placed on the public speaker list for the teleconference, and by close of business January 24, 2004 in order to be placed on the public speaker list for the face-to face meeting. Speakers should bring at least 35 copies of their comments and presentation slides for distribution to the participants and public at the meeting. Written Comments: Although the SAB Staff Office accepts written comments until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least seven business days prior to the meeting date so that the comments may be made available to the panel for their consideration. Comments should be supplied to the DFO at the address/contact information noted above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files in IBM-PC/Windows 98/2000/XP format). Those providing written comments and who attend the meeting are also asked to bring 35 copies of their comments for public distribution.

Meeting Accommodations: Individuals requiring special accommodation to access the public meetings listed above should contact the DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: January 5, 2005.

Vanessa Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 05–500 Filed 1–10–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7860–4]

Science Advisory Board (SAB) Staff Office; Notification of Upcoming Science Advisory Board Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference meeting to discuss the review of two draft SAB reports.

DATES: January 26, 2005, 1–3 pm (Eastern Time).

ADDRESSES: The meeting for these reviews will be held by telephone only.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information regarding this teleconference meeting may contact Mr. Thomas O. Miller, Designated Federal Officer (DFO), U.S. EPA Science Advisory Board via phone (202–343–9982) or e-mail at *miller.tom@epa.gov*.

The SAB Mailing address is: U.S. EPA, Science Advisory Board (1400F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. General information about the SAB, as well as any updates concerning the meeting announced in this notice, may be found on the SAB Web site at: *http://www.epa.gov/sab*.

SUPPLEMENTARY INFORMATION: The purpose of this SAB telephone conference meeting is to conduct a public review and discussion of the two SAB draft reports; Review of EPA's Drinking Water Research Program Multi-Year Plan 2003, and Advisory on the Office of Research and Development's Contaminated Sites and RCRA Multi-Year Plans. The focus of the discussion will consider if: (i) The original charge questions to the SAB review panels have been adequately addressed in the draft reports, (ii) the draft reports are clear and logical; (iii) the conclusions drawn, or recommendations made in the draft reports, are supported by the body of the reports; and (iv) if there are any obvious technical errors, omissions, or issues that are inadequately dealt with in the draft reports.

Availability of Review Material for the Board Meeting: Documents that are the subject of this meeting are available on the SAB Web site at: *http://www.epa.gov/sab/drrep.htm*.

Procedures for Providing Public Comment: The SAB Staff Office accepts written public comments of any length, and accommodates oral public comments whenever possible. The SAB Staff Office expects that public statements presented at SAB meetings will not be repetitive of previously submitted oral or written statements. *Oral Comments:* In general, each individual or group requesting an oral presentation at a teleconference meeting will usually be limited to no more than three minutes per speaker and no more than fifteen minutes total. Interested parties should contact the DFO noted above in writing via e-mail at least one week prior to the meeting in order to be placed on the public speaker list for the meeting. Speakers should provide an electronic copy of their comments for distribution to interested parties and participants in the meeting. *Written Comments:* Although written comments are accepted until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the DFO at the address/contact information above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM–PC/Windows 98/2000/XP format).

Meeting Accommodations: Individuals requiring special accommodation to access this teleconference meeting, should contact the DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: January 5, 2005.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 05–502 Filed 1–10–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EDOCKET ID No.: ORD–2004–0024; FRL–7860–1]

Board of Scientific Counselors, Executive Committee Meeting—Winter 2005

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of an Executive Committee meeting of the Board of Scientific Counselors (BOSC).

DATES: The meeting will be held on Thursday, January 27, 2005 from 9:30 a.m. to 5 p.m. Time has been allotted from 8:30 a.m. to 9:30 a.m. for BOSC members of seven subcommittees (Endocrine Disrupting Chemicals (EDCs), Global Change, Mercury, Drinking Water, Human Health, Particulate Matter, and Ecological) to meet prior to the Executive Committee meeting. The meeting will continue on Friday, January 28, 2005 from 8:30 a.m. to 1:30 p.m. All times noted are eastern time. The meeting may adjourn early on Friday if all business is finished. Written comments, and requests for the draft agenda or for making oral presentations at the meeting will be accepted up to 1 business day before the meeting date.

ADDRESSES: The meeting will be held at the Key Bridge Marriott, 1401 Lee Highway, Arlington, Virginia 22209.

Document Availability

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Ms. Lorelei Kowalski, Designated Federal Officer, via telephone/voice mail at (202) 564–3408, via e-mail at *kowalski.lorelei@epa.gov*, or by mail at Environmental Protection Agency, Office of Research and Development, Mail Code 8104–R, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

In general, each individual making an oral presentation will be limited to a total of three minutes. The draft agenda can be viewed through EDOCKET, as provided in Unit I.A. of the **SUPPLEMENTARY INFORMATION** section.

Submitting Comments

Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B. of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Ms. Lorelei Kowalski, Designated Federal Officer, via telephone/voice mail at (202) 564–3408, via e-mail at *kowalski.lorelei@epa.gov*, or by mail at Environmental Protection Agency, Office of Research and Development, Mail Code 8104–R, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

Proposed agenda items for the meeting include, but are not limited to: Discussion of the BOSC's review of ORD's Coastal Condition Report; update on subcommittees for mercury and computational toxicology; update on program review subcommittees for endocrine disruptors, global change, human health, particulate matter, drinking water, and ecological; update on the BOSC risk assessment workshop in February 2005; update on ORD communications activities; briefing on ORD's National Homeland Security Research Center (management and communications plans); National Academy of Science presentation on models in the regulatory decision process; update on EPA's Science Advisory Board activities; and future issues and plans (including the Communications and Nomination Subcommittees). The meeting is open to the public.

Information on Services for the Handicapped: Individuals requiring special accommodations at this meeting should contact Lorelei Kowalski, Designated Federal Officer, at (202) 564–3408, at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation.

A. How Can I Get Copies of Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. ORD–2004–0024. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Documents in the official public docket are listed in the index in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy of the draft agenda may be viewed at the Board of Scientific Counselors, Executive Committee Meeting—Winter 2005

Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. EDOCKET. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EDOCKET at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet home page, *http://www.epa.gov,* select ''Information Sources,'' ''Dockets,'' and ''EDOCKET.'' Once in the system, select ''search,'' and then key in Docket ID No. ORD–2004–0024. The system is an anonymous access system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. E-mail. Comments may be sent by electronic mail (e-mail) to *ORD.Docket@epa.gov,* Attention Docket ID No. ORD–2004–0024. In contrast to EPA's electronic public docket, EPA's e-mail system is not an anonymous access system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.B.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: U.S. Environmental Protection Agency, ORD Docket, EPA Docket Center (EPA/DC), Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. ORD–2004–0024.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. ORD–2004–0024 (note: this is not a mailing address). Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.A.1.

Dated: January 5, 2005.

Kevin Y. Teichman,

Director, Office of Science Policy.

[FR Doc. 05–497 Filed 1–10–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7859–9]

Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as Amended by the Superfund Amendments and Reauthorization Act, Camelot Cleaners West Fargo Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: Notification is hereby given that the United States Environmental Protection Agency proposes to enter into an Agreement for Recovery of Response Costs (Agreement) relating to the Camelot Cleaners West Fargo Superfund Site located in West Fargo, North Dakota. The proposed Agreement is subject to final approval after the comment period. The Agreement resolves Superfund liability for all response costs under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended, against Camelot Cleaners, Inc., DCI, USA, Inc., and National Dry Cleaners, Inc. The Agreement requires the settling parties to pay EPA $200,000 in twelve monthly installments. If the settling parties refinance their current secured debt within three years after the Agreement becomes final, they will pay

EPA half of the savings realized by such refinancing up to an additional $1.3 million. If the setting parties do not refinance their secured debt within three years after the Agreement becomes final they will pay EPA an additional $150,000 in twelve month installments. For thirty (30) days following the date of publication of this notice, EPA will accept written comments relating to the proposed Agreement. The Agency's response to any comments received will be available for public inspection at the Superfund Records Center at the U.S. Environmental Protection Agency, Region VIII, 999 18th Street, Denver, Colorado 80202.

Availability: The proposed Agreement is available for public inspection at the U.S. Environmental Protection Agency, Region VIII, 999 18th Street, Denver, Colorado 80202. A copy of the proposed Agreement may be obtained from Carol Pokorny, Enforcement Specialist, U.S. Environmental Protection Agency, Region VIII, 999 18th Street, Suite 300, 8ENF–RC, Denver, Colorado 80202. Comments should reference the ''Camelot Cleaners West Fargo Superfund Site'' and should be forwarded to Carol Pokorny, Enforcement Specialist, at the above address.

FOR FURTHER INFORMATION CONTACT: Andrea Madigan, Enforcement Attorney, U.S. Environmental Protection Agency, Region VIII, 999 18th Street, Suite 300, ENF-L Denver, Colorado 80202.

Dated: January 3, 2005.

It is so agreed:

Carol Rushin,

Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region 8.

[FR Doc. 05–498 Filed 1–10–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket: OW–2004–0039; FRL–7860–3]

Promoting Water Conservation in Multi-Family Housing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for comment.

SUMMARY: The Environmental Protection Agency (EPA) is seeking public comment on water metering and billing systems that promote full cost and conservation pricing to achieve water conservation within the drinking water industry. In addition, EPA seeks information on ways that residential and commercial water users, and drinking water utilities can reduce water use and promote water conservation.

DATES: Comments must be received on or before March 14, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No.OW–2004–0039, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: Comments may be sent by electronic mail (e-mail) to *OWDocket@epa.gov*. Attention Docket ID No. OW–2004–0039.
- Mail: Water Docket, Environmental Protection Agency, Mail Code 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW–2004–0039. Please include a total of three (3) copies.
- Hand Delivery: Environmental Protection Agency, EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. Attention Water Docket ID No. OW–2004–0039. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OW–2004–0039. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For more information please contact Sarah Koppel by phone at (202) 564–3859, or by e-mail at *koppel.sarah@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the action by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

B. Background of Final Revised Policy

On December 23, 2003, the Environmental Protection Agency (EPA) published a final memorandum in the **Federal Register** (68 FR 74233) that outlined its revised policy regarding regulatory requirements under the Safe Drinking Water Act (SDWA) for properties that submeter for water usage. Through the revised policy memorandum, as a way to promote full cost and conservation pricing to achieve water conservation, the EPA changed its long standing interpretation of SDWA section 1411 as it applies to submetered properties. Under the revised policy, a property owner who had not previously been (or would not be) subject to SDWA national primary drinking water regulations through SDWA section 1411, and who installs submeters to accurately track usage of water by tenants on his or her property, will not then be subject to SDWA regulations solely as a result of taking the action to submeter and bill. EPA took this action because the Agency believed that water submetering promotes water conservation. The data and information available to EPA in December of 2003 did not show that allocated billing systems, such as ratio utility billing systems (RUBS) and hot water hybrid (HWH) systems, would promote water conservation. Therefore, EPA did not include other billing systems in the final revised policy.

The findings of a new two-year study of water billing practices in the multi-family residential sector, released on August 30, 2004, show the water conservation benefits of submetering. The study was conducted by Aquacraft, Inc. of Boulder, Colorado, the National Research Center, and Potomac Resources. The study underwent extensive peer review and was sponsored by EPA, National Apartment Association, National Multi Housing Council, City of Austin, City of Phoenix, City of Portland, City of Tucson, Denver Water Department, East Bay Municipal Utility District, San Antonio Water System, San Diego County Water Authority, Seattle Public Utilities, and Southern Nevada Water Authority. A copy of the study can be accessed at EPA Docket ID No. OW–2004–0039. The study showed that ''Submetering was found to achieve statistically significant water savings of 15.3 percent (21.8 gal/day/unit) compared to traditional in-rent properties after correcting for factors * * *'' In addition, ''This study found no evidence that Ratio Utility Billing Systems (RUBS) reduced water use by a statistically significant amount compared with traditional in-rent arrangements, and the data showed that the difference between water use in RUBS and in-rent properties was not statistically different from zero''.

The findings and recommendations of the study will help EPA and the drinking water industry better understand current mechanisms available to facilitate water conservation in multi-family housing. EPA strongly supports water conservation efforts, and encourages all actions to promote conservation by renters, homeowners, apartment owners, and water systems.

Dated: January 6, 2005.

Benjamin Grumbles,

Acting Assistant Administrator, Office of Water.

[FR Doc. 05–499 Filed 1–10–05; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank).

SUMMARY: The Advisory Committee was established by Public Law 98–181, November 30, 1982, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

Time and Place: Monday, January 31, 2005 from 10 a.m. to 12 p.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Agenda items include a briefing of the Advisory Committee members on their responsibilities, an update on Ex-Im Bank related legislative issues, and an introduction of the Advisory Committee strategy for 2005.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to January 24, 2005, Teri Stumpf, Room 1203, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3502 or TDD (202) 565–3377.

FOR FURTHER INFORMATION CONTACT: For further information, contact Teri Stumpf, Room 1203, 811 Vermont Ave., NW., Washington, DC 20571, (202) 565–3502.

Peter Saba,

General Counsel.

[FR Doc. 05–454 Filed 1–10–05; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

December 28, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the

Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before March 14, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0804.

Title: Universal Service ''Health Care Providers Universal Service Program.

Form Nos.: FCC Forms 465, 466, 466–A and 467.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and State, local or tribal government.

Number of Respondents: 14,440.

Estimated Time Per Response: 1–3 hours.

Frequency of Response: On occasion and annual reporting requirements, recordkeeping requirement and third party disclosure requirement.

Total Annual Burden: 17,720 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission implemented the rural health care mechanism at the direction of Congress as provided in the Telecommunications Act of 1996 (1996 Act). In past years of its operation, the rural health care mechanism has provided discounts that have facilitated the ability of health care providers to provide critical access to modern telecommunications and information services for medical and health maintenance purposes to rural America. Participation in the rural health care universal service support mechanism, however, has not met the Commission's projections.

In the Second Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, released on December 17, 2004, in FCC 04–289, the Commission modifies the definition of ''rural'' for purposes of the rural health care universal service support mechanism. The Commission also revises its policy to allow mobile rural health care clinics to receive discounts for telecommunications services. In addition, the Commission permits States and territories that are entirely rural to receive funding for advanced telecommunications and information services. The Commission also establishes a deadline for filing the FCC Form 466. Finally, the Commission seeks comment on whether support for Internet access should be increased and whether support should be provided for upgrades to the public switched or backbone telecommunications networks.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–468 Filed 1–10–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 98–67 and CG Docket No. 03–123; DA 04–3921]

Comments Requested on Petition for Declaratory Ruling and Request for Clarification Filed Concerning Two-Line Captioned Telephone Voice Carry Over Service, a Form of Telecommunications Relay Service

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document seeks public comment on Ultratec, Inc., Sprint Corporation, and Hamilton Relay, Inc., *Request for Clarification* and the National Exchange Carrier Association, Inc., *Petition for Declaratory Ruling* concerning two-line captioned telephone voice carry over (VCO) service, a form of telecommunications relay service (TRS).

DATES: Interested parties may file comments in this proceeding on or before January 7, 2005. Reply comments may be filed on or before January 19, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Dana Jackson, Consumer & Governmental Affairs Bureau, Disability Rights Office at (202) 418–2247 (voice), (202) 418–7898 (TTY), or e-mail at *Dana.Jackson@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Public Notice* DA 04–3921, released December 16, 2004. On August 1, 2003, the Commission released a *Declaratory Ruling,* published at 68 FR 55898, September 29, 2003, in CC Docket No. 98–67; FCC 03–190. In the *Declaratory Ruling,* the Commission clarified that certain TRS mandatory minimum standards do not apply to captioned telephone VCO service. When filing comments, please reference CC Docket No. 98–67 and CG Docket No. 03–123. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comment to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To get filing instructions, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Services mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together

with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–B204 Washington, DC 20554. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted, along with three paper copies, to: Dana Jackson, Consumer & Governmental Affairs Bureau, Disability Rights Office, 445 12th Street, SW., Room CY–A626, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number in this case, CC Docket No. 98–67 and CG Docket No. 03–123, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Best Copy and Printing (BCPI), Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Pursuant to § 1.1206 of the Commission's rules, 47 CFR 1.1206, this proceeding will be conducted as a permit-but-disclose proceeding in which *ex parte* communications are subject to disclosure. The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document and copies of subsequently filed documents in this matters may also be purchased from the Commission's duplicating contract, BCPI, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site *http://www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). The *Public Notice* can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro.*

Synopsis

On December 7, 2004, Ultratec, Inc., Sprint Corporation, and Hamilton Relay, Inc., (''the Petitioners'') filed a Request for Clarification, (*see* Ultratec, Inc., Sprint Corporation, and Hamilton Relay, Inc., *Request for Clarification,* CC Docket No. 98–67 and CG Docket No. 03–123, filed December 7, 2004), seeking clarification that a two-line voice carryover (VCO) service called two-line captioned telephone VCO service is a form of telecommunications relay service (TRS) eligible for reimbursement from the Interstate TRS Fund. On December 10, 2004, the National Exchange Carrier Association, Inc. (''NECA''), (*see* National Exchange Carrier Association, Inc., *Petition for Declaratory Ruling,* CC Docket No. 98–67 and CG Docket No. 03–123, filed December 10, 2004), on behalf of the Interstate Telecommunications Relay Service Advisory Council (''the Council''), filed a *Petition for Declaratory Ruling* requesting that the Commission approve its proposed methodology for the jurisdictional allocation of costs for the provision of *inbound* two-line captioned telephone VCO service. NECA proposes that ten percent of the inbound two-line captioned telephone VCO service minutes would be allocated for payment from the Interstate TRS Fund. Captioned telephone service is an enhanced VCO service. *See generally Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Declaratory Ruling,* CC Docket No. 98–67, FCC 03–190, 68 FR 55898, September 29, 2003, finding that captioned telephone VCO service is a form of TRS eligible for compensation from the Interstate TRS Fund. VCO service is a type of TRS used by persons who have a hearing disability but are able to speak directly to the other end user. The communications assistant types the response back to the person with the hearing disability, but does not voice the conversation.

See 47 CFR 64.601(18). Captioned telephone VCO service permits the user to both listen to what is said over the telephone and simultaneously read captions of what the other person is saying.

Federal Communications Commission.

Jay Keithley,

Deputy Bureau Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 05–469 Filed 1–10–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; Open Commission Meeting, Thursday, January 13, 2005

January 6, 2005.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, January 13, 2005, which is scheduled to commence at 9:30 a.m. in Room TW–C305, at 445 12th Street, SW., Washington, DC. The Meeting will focus on presentations by senior agency officials regarding implementations of the agency's strategic plan and a comprehensive review of FCC policies and procedures.

Presentations will be made in four panels:

Panel One will feature the Chief of the Office of Strategic Planning and Policy Analysis and the Managing Director.

Panel Two will feature the Chiefs of the Wireless Telecommunications Bureau, the Office of Engineering and Technology and the International Bureau.

Panel Three will feature the Chief of the Consumer & Governmental Affairs Bureau, the Director of the Office of Workplace Diversity and the Chief of the Enforcement Bureau.

Panel Four will feature the Chief of the Media Bureau, the General Counsel and the Chief of the Wireline Competition Bureau.

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live over the Internet from the FCC's Audio/Video Events Web page at *www.fcc.gov/realaudio.*

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *www.capitolconnection.gmu.edu.*

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e-mail at *FCC@BCPIWEB.com*.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–650 Filed 1–7–05; 2:51 pm]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 26, 2005.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034::

1. Magers Family Irrevocable Trust, Springfield, Missouri (''Trust''), to acquire voting shares of Marshfield Investment Company, Springfield, Missouri (''Marshfield''), and thereby indirectly acquire voting shares of Metropolitan National Bank, Springfield, Missouri. Also, a control group consisting of Trust and its trustees, William B. Magers and Randall W. Magers, both of Springfield, Missouri, to increase their aggregate control of Marshfield.

Board of Governors of the Federal Reserve System, January 6, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–519 Filed 1–10–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 4, 2005.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Seacoast Banking Corporation of Florida, Stuart, Florida; to acquire 100 percent of the voting shares of Century National Bank, Orlando, Florida.

B. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. Franklin Resources, Inc., San Mateo, California; to retain 6.54 percent of the voting shares of First State Bancorporation, Albuquerque, New Mexico, and thereby indirectly acquire First State Bank N.M., Taos, New Mexico.

2. Franklin Resources, Inc., San Mateo, California; to retain 7.93 percent of the voting shares of Peoples Bancorp, Inc., Marietta, Ohio, and thereby indirectly acquire Peoples Bank, National Association, Marietta, Ohio.

Board of Governors of the Federal Reserve System, January 5, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–462 Filed 1– 10–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of December 14, 2004

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on December 14, 2004.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long–run objectives, the Committee in the immediate future seeks conditions in reserve markets consistent with increasing the federal funds rate to an average of around 2-1/4 percent.

By order of the Federal Open Market Committee, January 4, 2005.

Vincent R. Reinhart,

Secretary, Federal Open Market Committee.

[FR Doc. 05–494 Field 1–10–05; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: OCSE–157 Child Support Enforcement Program Annual Data Report.

OMB No.: 0970–0177.

Description: The data collected by form OCSE–157 are used to prepare the Office of Child Support Enforcement (OCSE) annual data report. In addition,

[1] Copies of the Minutes of the Federal Open Market Committee meeting on December 14, 2004, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

these data are used to determine State performance indicators for establishing the effectiveness and efficiency of the State child support programs for incentive and penalty purposes.

Respondents: State child support enforcement agencies or the department/agency/bureau responsible for child support enforcement in each state.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–157	54	1	7.0	378.0

Estimated Total Annual Burden Hours: 378.0.

In compliance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *rsargis@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: January 4, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–449 Filed 1–10–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Low Income Home Energy Assistance Program (LIHEAP) Carryover and Reallotment Report.

OMB No.: 0970–0106.

Description: The LIHEAP statute and regulations require LIHEAP grantees to report certain information to HHS concerning funds forwarded and funds subject to reallotment. The 1993 reauthorization of the LIHEAP statute, the Human Service Amendments of 1994 (Pub. L. 103–252), requires that the carryover and reallotment report for one fiscal year be submitted to HHS by the grantee before the Allotment for the next fiscal year may be awarded.

We are requesting no changes in the collection of data with the Carryover and Reallotment Report for FY 20__, a form for the collection of data, and the Simplified Instructions for Timely Obligations of FY 20__ LIHEAP Funds and Reporting Funds for Carryover and Reallotment. The form clarifies the information being requested and ensures the subnmission of all the required information. The form facilitates our response to numerous queeries each year concerning the amounts of obligated funds. Use of the form is voluntary. Grantees have the option to use another format.

Respondents: State, local or tribal government.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Carryover and Reallotment	177	1	3	531

Estimated Total Annual Burden Hours: 531.

Additional Information: Copies of the proposed collection may be obtained by writing to The Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail: *grjohnson@acf.dhhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer for ACF.

Dated: January 4, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–450 Filed 1–10–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

President's Committee for People With Intellectual Disabilities: Notice of Meeting

AGENCY: President's Committee for People with Intellectual Disabilities (PCPID), HHS.

ACTION: Notice of meeting.

DATES: Monday, January 31, 2005, from 9 a.m. to 5 p.m.; and Tuesday, February 1, 2005 from 9 a.m. to 3 p.m. The full committee meeting of the President's Committee for People with Intellectual Disabilities will be open to the public.

ADDRESSES: The meeting will be held at the Aerospace Center Building, Aerospace Auditorium, 6th Floor East, 370 L'Enfant Promenade, SW., Washington, DC 20447. Individuals with disabilities who need accommodations in order to attend and participate in the meeting (*i.e.,* interpreting services, assistive listening devices, materials in alternative format) should notify Sally Atwater at (202) 619–0634 no later than January 14, 2005. Efforts will be made to meet special requests received after that date, but availability of special needs accommodations to respond to these requests cannot be guaranteed. All meeting sites are barrier free.

Agenda: The Committee plans to discuss critical issues relating to individuals with mental retardation concerning education and transition, family services and supports, public awareness, employment, and assistive technology and information.

FOR FURTHER INFORMATION CONTACT: Sally Atwater, Executive Director, President's Committee for People with Intellectual Disabilities, Aerospace Center Building, Suite 701, 370 L'Enfant Promenade, SW., Washington, DC 20447, Telephone: (202) 619–0634, Fax: (202) 205–9519, e-mail: *satwater@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: The PCMR acts in an advisory capacity to the President and the Secretary of the U.S. Department of Health and Human Services on a broad range of topics relating to programs, services, and supports for persons with intellectual disabilities. The Committee, by Executive Order, is responsible for evaluating the adequacy of current practices in programs, services and supports for persons with intellectual disabilities, and for reviewing legislative proposals that impact on the quality of life that is experienced by citizens with intellectual disabilities and their families.

Dated: December 14, 2004.

Sally Atwater,

Executive Director, President's Committee for People with Intellectual Disabilities.

[FR Doc. 05–451 Filed 1–10–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Training Tomorrow's Scientists: Linking Minorities and Mentors Through the Web

SUMMARY: In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of Behavioral and Social Sciences Research (OBSSR), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Training Tomorrow's Scientists: Linking Minorities and Mentors Through the Web. *Type of Information Collection Request:* REVISION, OMB control number 0925–0475, Expiration Date 3/31/3005. *Need and Use of Information Collection:* This Web site allows federally-funded researchers supported by any of the 27 Institutes and Centers of the NIH to submit an electronic form describing his or her research areas, as well as interests in mentoring minority students or junior faculty. The researcher's description is posted on the Web site for searching by interested minority applicants. Minority students or junior faculty search the Web site to identify researchers with whom they would like to work. The research projects in the database are located all over the country and involve cutting edge research activities by scientists funded through the Institutes and Centers of the NIH. These research projects range from studies of children to research on older adults, from laboratory research to field research, from social research to a combination of biological and behavioral research. Applicants conduct an electronic search using categories such as research areas of interest, desired geographic location of the researcher, and their level of education. The primary objective of the program is to ensure that, in the coming decades, a concentration of minority researchers will be available to address behavioral and social factors important in improving the public health and eliminating racial disparities. Increasing the number of minority scientists in the U.S. will expand our currently limited knowledge about the epidemiology and treatment of diseases in minority population. *Frequency of Response:* On occasion. *Affected Public:* Individuals or households. *Type of Respondents:* Students, Post-doctorals, Junior Faculty, and Principal Investigators. The annual reporting burden is as follows: *Estimated Number of Respondents:* 400; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours per Response:* 10 minutes; and *Estimated Total Annual Burden Hours Requested:* 148. There is no annualized cost to respondents. There are no Capital Costs, Operating Costs and/or Maintenance Costs to report.

ANNUAL BURDEN HOURS FOR RESPONDENTS

Type of respondents	Estimated No. of respondents	Frequency of response	Activity	Average time per response	Estimated annual burden hours
NIH-Funded Behavioral Researchers	50	1	Peruse Site	.168	8
	20	1	Complete Form	.5	10
High School Students	50	1	Peruse Site	.25	12
	5	1	Complete Form	.74	4
College Students	70	1	Peruse site	.25	17
	15	1	Complete Form	.668	10
Graduate Students	100	1	Peruse site	.25	25
	25	1	Complete Form	.5845	15
Postdoctoral Fellows	65	1	Peruse site	.25	16

ANNUAL BURDEN HOURS FOR RESPONDENTS—Continued

Type of respondents	Estimated No. of respondents	Frequency of response	Activity	Average time per response	Estimated annual burden hours
	20	1	Complete Form	.5	10
Junior Faculty	65	1	Peruse site	.25	16
	10	1	Complete Form	.5	5
Total per year	400				148

Requests for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility: (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

For Further Information Contact: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Ms. Dana Sampson, Program Analyst, OBSSR, OD, NIH, Building 1, Room 256, 1 Center Drive, Bethesda, MD 20892, or call non-toll-free number (301) 402–1146 or e-mail your request, including your address to: *SampsonD@od.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: December 27, 2004.

Fred C. Walker,

Acting Executive Officer, Office of the Director, National Institutes of Health.

[FR Doc. 05–465 Filed 1–10–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Emergency Processing; Rapid Access to Interventional Development

SUMMARY: Under provisions of section 1320.13 of Regulations Implementing the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) is requesting approval from the Office of Management and Budget (OMB) approval of the information collection involved in the Rapid Access to Intervention Development (RAID) mechanism. Under this program NIH makes NIH resources available to requesting extramural investigators with the goal of speeding the progress of therapeutic, preventive and/or imaging agents to clinical testing.

Since the number of requests from extramural investigators greatly exceeds the available resources of the NIH, the NIH needs to collect scientific background information from the extramural investigators to determine which requests are most meritorious. The instructions on the NIH Web sites identified below explain the procedures for applying.

The initial RAID program was developed in 1998 with authorization by the National Cancer Institute (NCI) Board of Scientific Counselors (BSC) and the National Cancer Advisory Board (NCAB). Subsequently, the RAID type programs were expanded within NCI and adopted also by other NIH components [National Institute of Allergy and Infectious Diseases (NIAID) and *National Institute of Diabetes and Digestive and Kidney Diseases* (NIDDK)]. However, the requirement for clearance of the information collection burden associated with the programs was not recognized. Officials in NCI believed that the support of the research facilitated by the RAID-type programs was already covered under existing OMB authorized information collections (OMB No. 0925–0001/Exp. 9/2007 and OMB NO. 0925–0002/Exp. 6/2005), which provide for regular exchanges of information between NIH program officials and the investigators, who are supported by NIH discretionary investigator-initiated research grants, to assure that NIH remains responsive to new directions in the research, progress in conducting the research and additional budgetary and scientific resources needed to successfully complete the research. As a consequence, the requirement for specific approval of the information collected in the furtherance of the Federal assistance activity was not formally recognized.

At this time, NIH is requesting by emergency clearance procedures that the OMB approve the collection of information under the various existing RAID-type programs and to approve the proposed expansion of the program to accommodate new initiatives under the NIH Director's Roadmap (*http://nihroadmap.nih.gov/*), which will employ the RAID model to facilitate advances in research by rapid availability of needed resources. Six Raid-like programs are currently in existence; another is shortly to be announced. NCI RAID (*http://dtp.nci.nih.gov/docs/raid/raid_index.html*); NCI R*A*N*D (*http://dtp.nci.nih.gov/docs/rand/rand_index.html*); NCI–NIAID Inter-Institute Program for the Development of AIDS-Related Therapeutics (*http://dtp.nci.nih.gov/docs/dart/dart/html*); NCI RAPID (*http://www3.cancer.gov/prevention/rapid/*); NCI DECIDE (*http://dtp.nci.nih.gov/docs/ddg/ddg_descript.html*); NIDDKT1D–RAID (*http://www.niddk.nih.gov/fund/diabetesspecailfunds/t1d-raid/raid.htm*); NIH Roadmap RAID program (*http://nihroadmap.nih.gov/*).

The NIH has determined that the continuing collection of information is essential to the mission of the agency and the agency cannot reasonably comply with the normal clearance procedures because public harm is reasonably likely to result and the use of the normal clearance process is reasonably likely to disrupt the collection of information.

NIH is requesting OMB approval by January 24, 2005, in order to be able to receive applications from scientific investigators that have been in preparation and development for many months in the expectation of support under the announced due dates of the RAID programs. Delay or deferral will create disruption of on going investigations and delay scientific advances.

Proposed Collection: Title: ''Rapid Access to Interventional Development.'' The NCI RAID program receives between 30–40 applications yearly. R*A*N*D receives 8–10 applications yearly. IIP receives 10–15 applications yearly. Technology transfer information—2 hours per application, completed by technology transfer specialist. Letters of commitment—0.5 hours per application, completed by institutional head of clinical research. Application—30–40 hours per application, completed by Ph.D., or M.D., Ph.D., level scientist. Other RAID type programs accept about 10–12 applications; however, the length of the material requested is somewhat shorter than the NCI Raid programs. The proposed NIH director's Roadmap Initiative anticipates 20–30 applications in the initial round. The total annual burden anticipated for the receipt dates for this emergency clearance request is estimated to be 4000 hours. A subsequent regular request for approval of the continuing collection will address the future estimated annual burden. The cost to the respondents based on the 4000 hour burden will be approximately $250,000.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time should be directed to the Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Mr. Joe Ellis, Division of Grants Policy, Office of Policy for Extramural Research Administration, NIH, Rockledge 1 Building, Room 3513, 6705 Rockledge Drive, Bethesda, MD 20892–7974, or call non-toll-free number (301) 435–0935, or e-mail your request, including your address to: *ellisj@od.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: January 4, 2005.

Joe Ellis,

Acting Director, OPERA, OER, National Institutes of Health.

[FR Doc. 05–466 Filed 1–10–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[CGD 01–04–154]

Notice, Announcement of Public Meeting; Letter of Recommendation, Keyspan LNG Facility Providence, RI

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: In response to public comments on the proposed Keyspan Liquefied Natural Gas (LNG) facility in Providence, RI, the Coast Guard is co-sponsoring two public hearings. This action will afford the public and the owner or operator additional time and opportunity to provide the Coast Guard with information regarding the proposed Keyspan LNG facility.

DATES: Public meetings will be held on Tuesday, January 11, 2005 and Wednesday, January 12, 2005.

ADDRESSES: Public meetings will be held on Tuesday, January 11, 2005, at the Roger Williams Middle School, 278 Thurbers Avenue, Providence, Rhode Island and on Wednesday, January 12, 2005 at the Gaudet Middle School, 1113 Aquidneck Avenue, Middletown, Rhode Island.

FOR FURTHER INFORMATION CONTACT: Ms. Erin Lamby, Marine Safety Office Providence at (401) 435–2355.

SUPPLEMENTARY INFORMATION:

Request for Comments

In accordance with the requirements in 33 CFR 127.009, the U.S. Coast Guard Captain of the Port (COTP) Providence is preparing a Letter of Recommendation as to the suitability of the Narragansett Bay waterways for liquefied natural gas (LNG) marine traffic. The Letter of Recommendation will be issued in response to a Letter of Intent to operate a LNG facility at the Keyspan facility in Providence, RI. On September 1, 2004, the COTP Providence published a **Federal Register** Notice seeking comments on the suitability of Narragansett Bay and the Providence River to accommodate LNG marine traffic. (See the **Federal Register**, Vol. 69, No. 169, Wednesday, September 1, 2004, pages 53454–53455.) A total of 4 public comments were received by the November 1, 2004 deadline, of which only one of them requested that the Coast Guard hold a public meeting. Consequently, the Coast Guard will co-sponsor two public hearings at the time and place described in the Public Meeting paragraph below.

Public Meeting

We intend to hold two public meetings to receive comments on navigation safety issues pertaining to the proposed LNG facility at the Keyspan, Providence, RI site. The times, dates, and locations for this meeting are:

(1) 6:45 p.m., Tuesday, January 11, 2005, at the Roger Williams Middle School, 278 Thurbers Avenue, Providence, Rhode Island.

(2) 6:45 p.m., Wednesday, January 12, 2005 at the Gaudet Middle School, 1113 Aquidneck Avenue, Middletown, Rhode Island.

Additional Information

Additional information about the Keyspan LNG project is available from FERC's Office of External Affairs at 1–866–208-FERC or on the FERC internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, then click on ''General Search'' and enter FERC's docket number excluding the last three digits in the Docket Number field (*i.e.*, CP04–36). For assistance, please contact FERC online support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY contact 1–202–502–8659.

Dated: January 3, 2005.

M.E. Landry,

Captain, U.S. Coast Guard, Captain of the Port, Providence.

[FR Doc. 05–531 Filed 1–6–05; 3:17 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4665–N–21]

Conference Call Meeting of the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of upcoming meeting via conference call.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee) to be held via telephone conference. This meeting is open to the general public, which may participate by following the instructions below.

DATES: The conference call meeting will be held on Thursday, January 27, 2005, from 11 a.m. to 4 p.m. eastern time.

ADDRESSES: Information concerning the conference call can be obtained from the Department's Consensus Committee Administering Organization, the National Fire Protection Association (NFPA). Interested parties can log onto NFPA's Web site for instructions on how to participate, and for contact information for the conference call: *http://www.nfpa.org/categoryList.asp?categoryID=858.*

Alternately, interested parties may contact Jill McGovern of NFPA by phone at (617) 984–7404 (this is not a toll-free number) for conference call information.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Administrator, Office of Manufactured Housing Programs, Office of the Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with Sections 10(a) and (b) of the Federal Advisory Committee Act (5 U.S.C. App. 2) and 41 CFR 102–3.150. The Manufactured Housing Consensus Committee was established under section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 4503(a)(3). The Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured home construction and safety standards and procedural and enforcement regulations, and with developing and recommending proposed model installation standards to the Secretary.

The purpose of this conference call meeting is for the Committee to review and make recommendations to the Secretary on proposed changes to title 24, Code of Federal Regulations, part 3282, sections 401 through 418.

Tentative Agenda:

A. Roll Call.

B. Welcome and Opening Remarks.

C. Full Committee meeting and take actions proposed changes to 24 CFR part 3282, Subpart I of the Regulations.

D. Public Testimony.

E. Adjournment.

Dated: January 3, 2005.

Sean Cassidy,

General Deputy Assistant Secretary for Housing.

[FR Doc. E5–48 Filed 1–10–05; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications.

SUMMARY: The following applicants have applied for scientific research permits to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended.

DATES: To ensure consideration, written comments must be received on or before February 10, 2005.

ADDRESSES: Written comments should be submitted to the Chief, Endangered Species Division, Ecological Services, P.O. Box 1306, Room 4102, Albuquerque, New Mexico 87103. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act. Documents will be available for public inspection, by appointment only, during normal business hours at the U.S. Fish and Wildlife Service, 500 Gold Ave. SW, Room 4102, Albuquerque, New Mexico. Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Chief, Endangered Species Division, (505) 248–6920.

SUPPLEMENTARY INFORMATION:

Permit No. TE–093661

Applicant: Marvin Miller, Spring Branch, Texas. Applicant requests a new permit for research and recovery purposes to survey for and collect the following species within Texas: Helotes mold beetle (*Batrisodes venyivi*), Madla cave meshweaver (*Cicurina madla*), Bracken Bat Cave meshweaver (*Cicurina venii*), Government Canyon Bat Cave meshweaver (*Cicurina vespera*), Government Canyon Bat Cave spider (*Neoleptoneta microps*), ground beetle (*Rhadine exilis*), and ground beetle (*Rhadine infernalis*).

Permit No. TE–028605

Applicant: SWCA-Flagstaff, Flagstaff, Arizona. Applicant requests an amendment to an existing permit to allow salvage and holding of salvaged specimens of the following species within Arizona: black-footed ferret (*Mustela nigripes*), Hualapai Mexican vole (*Microtus mexicanus hualpaiensis*), lesser long-nosed bat (*Leptonycteris curasoae yerbabuensis*), bald eagle (*Haliaeetus leucocephalus*), cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*), California condor (*Gymnogyps californianus*), northern aplomado falcon (*Falco femoralis septentrionalis*), southwestern willow flycatcher (*Empidonax traillii extimus*), Yuma clapper rail (*Rallus longirostris yumanensis*), and Sonoran tiger salamander (*Ambystoma tigrinum stebbinsi*).

Permit No. TE–069320

Applicant: KBA EnviroScience, Lewisville, Texas. Applicant requests an amendment to an existing permit to allow presence/absence surveys for the following species within Texas: black-capped vireo (*Vireo atricapillus*), brown pelican (*Pelecanus occidentalis*), golden-cheeked warbler (*Dendroica chrysoparia*), interior least tern (*Sterna antillarum*), northern aplomado falcon (*Falco femoralis septentrionalis*), piping plover (*Charadrius melodus*), red-cockaded woodpecker (*Picoides borealis*), southwestern willow flycatcher (*Empidonax traillii extimus*), Houston toad (*Bufo houstonensis*), Clear Creek gambusia (*Gambusia heterochir*), fountain darter (*Etheostoma fonticola*), and San Marcos gambusia (*Gambusia georgei*).

Permit No. TE–045236

Applicant: SWCA-Albuquerque, Albuquerque, New Mexico. Applicant requests an amendment to an existing permit to allow surveys for and collection of Rio Grande silvery minnow (*Hybognathus amarus*) within New Mexico.

Permit No. TE–097324

Applicant: Hugo Magana, Albuquerque, New Mexico. Applicant requests a new permit for research and recovery purposes to survey for and collect Rio Grande silvery minnow (*Hybognathus amarus*) within New Mexico.

Permit No. TE–095289

Applicant: Jon Nelson, Phoenix, Arizona. Applicant requests a new permit for research and recovery purposes to allow presence/absence surveys and nest monitoring of cactus ferruginous pygmy-owls (*Glaucidium brasilianum cactorum*) and southwestern willow flycatchers (*Empidonax traillii extimus*) within Arizona.

Permit No. TE–094375

Applicant: Azimuth Forestry Services, Shelbyville, Texas. Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for red-cockaded woodpeckers (*Picoides borealis*) within Texas. Applicant additionally requests authorization to survey for and collect voucher specimens of the following species within Texas: Navasota ladies'-tresses (*Spiranthes parksii*), Texas prairie dawn-flower (*Hymenoxys texana*), and Texas trailing phlox (*Phlox nivalis* ssp. *texensis*).

Authority: 16 U.S.C. 1531, *et seq.*

Dated: January 5, 2005.

Joy Nicholopoulos,

Acting Assistant Regional Director, Ecological Services, Region 2, Albuquerque, New Mexico.

[FR Doc. 05–481 Filed 1–10–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of the Draft Revised Recovery Plan for the Whooping Crane (*Grus americana*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of the draft revised Recovery Plan for the Whooping Crane (*Grus americana*). The whooping crane is found in the United States east of the Rocky Mountains and in central Canada. The Service solicits review and comment from the public on this draft revised Recovery Plan.

DATES: The comment period for this proposal closes March 14, 2005. Comments on the draft revised Recovery Plan must be received by the closing date to assure consideration.

ADDRESSES: Persons wishing to review the draft revised Recovery Plan can obtain a copy on a CD from the Whooping Crane Coordinator, Aransas National Wildlife Refuge, P.O. Box 100, Austwell, Texas 77950. The draft revised Recovery Plan may also be obtained from the Internet at *www.fws.gov/*. If you wish to comment, you may submit your comments and materials concerning this draft revised Recovery Plan to the address below.

FOR FURTHER INFORMATION CONTACT: Tom Stehn, USFWS Whooping Crane Coordinator, Aransas National Wildlife Refuge, P.O. Box 100, Austwell, Texas 77950; telephone (361) 286–3559, ext. 221, facsimile (361) 286–3722, e:mail: *Tom_Stehn@fws.gov*.

SUPPLEMENTARY INFORMATION:

Background

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the Service's endangered species program. To help guide the recovery effort, the Service is working to prepare Recovery Plans for most of the listed species native to the United States. Recovery Plans describe actions considered necessary for conservation of species, establish criteria for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S. C. 1531 *et seq.*) requires the development of Recovery Plans for listed species unless such a Plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during Recovery Plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised Recovery Plan. The Service and other Federal agencies will also take these comments into account in the course of implementing Recovery Plans.

The document submitted for review is the draft revised Recovery Plan for the whooping crane. In the United States, the whooping crane (*Grus americana*) was listed as Threatened with Extinction in 1967 and Endangered in 1970—both listings were ''grandfathered'' into the Endangered Species Act of 1973. Critical habitat was designated in 1978. In Canada, it was designated as Endangered in 1978 by the Committee on the Status of Endangered Wildlife in Canada; critical habitat will be designated upon publication of the final recovery strategy on the Species at Risk Act public registry.

Whooping cranes occur only in North America. About 300 individuals exist in the wild at 3 locations, and about 133 whooping cranes are in captivity at 8 sites. Only the Aransas-Wood Buffalo National Park Population that nests in Canada and winters in coastal marshes in Texas is self-sustaining with nearly 200 in the flock. With so few individuals surviving, the population remains in danger of extinction. Historic population declines resulted from habitat destruction, shooting, and displacement by activities of man. Current threats include limited genetics, loss and degradation of migration stopover habitat, collisions with power lines, and degradation of coastal habitat and threat of chemical spills.

The draft revised Recovery Plan includes scientific information about the species and provides objectives and actions needed to downlist the species. Recovery actions designed to achieve these objectives include protection and enhancement of the breeding, migration, and wintering habitat for the AWBP to allow the wild flock to grow and reach ecological and genetic stability, reintroduction and establishment of geographically separate self-sustaining wild flocks to ensure resilience to catastrophic events, and maintenance of a captive breeding flock to protect against extinction that is genetically managed to retain a minimum of 90% of the whooping crane's genetic material for 100 years.

The downlisting criteria proposed in the draft revised Recovery Plan are: (1) A minimum of 40 productive pairs in the AWBP and a minimum of 25 productive pairs occurring in self-sustaining populations at each of two other discrete locations (population targets of 160 in the AWBP and 100 at each of the other locations); and (2) 21 productive pairs in captivity as a safeguard to ensure long-term survival of the species (population target of 153).

Criteria to delist the species are not being proposed at this time.

The Whooping Crane draft revised Recovery Plan is being submitted for review to all interested parties, including technical peer review. After consideration of comments received during the review period, the recovery plan will be submitted for final approval.

Public Comments Solicited

The Service solicits written comments on the draft revised Recovery Plan described. All comments received by the date specified above will be considered prior to approval of the final Recovery Plan.

Authority

The authority for this action is Section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: December 27, 2004.

Bryan Arroyo,

Acting Regional Director, Region 2.

[FR Doc. 05–31 Filed 1–10–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–926–05–1910–BJ–4360]

Montana: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Montana State Office, Interior.

ACTION: Notice of filing of plat of survey.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings, Montana, (30) days from the date of publication in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Steve Toth, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, P.O. Box 36800, Billings, Montana 59107–6800, telephone (406) 896–5121 or (406) 896–5009.

SUPPLEMENTARY INFORMATION: This survey was executed at the request of the U.S. Forest Service and was necessary to delineate Forest Service lands. The lands we surveyed are:

Black Hills Meridian, South Dakota

T. 3 S., R. 12 E.

The plat, in 5 sheets, representing the dependent resurvey of a portion of the north boundary, a portion of the west boundary, a portion of the subdivisional lines, certain adjusted original meanders of the former left and right banks of the South Fork of the Cheyenne River, through sections 5, 8, 17, 18, and 19, and the 2001 meanders of the present left bank of the South Fork of the Cheyenne River, through sections 19 and 30, and the subdivision of sections 4, 8, 17, 18, and 19, and the survey of certain division of accretion lines and certain meanders of the present left and right banks of the South Fork of the Cheyenne River through sections 5, 8, 9, 17, 18, and 19, Township 3 South, Range 12 East, Black Hills Meridian, South Dakota, was accepted December 9 2004.

We will place copies of the plat, in 5 sheets, and related field notes we described in the open files. They will be available to the public as a matter of information.

If BLM receives a protest against this survey, as shown on this plat, in five sheets, prior to the date of the official filing, we will stay the filing pending our consideration of the protest.

We will not officially file this plat, in five sheets, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

Dated: January 4, 2005.

Steven G. Schey,

Acting Chief Cadastral Surveyor, Division of Resources.

[FR Doc. 05–483 Filed 1–10–05; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Extension of the Public Comment Period, Draft Environmental Impact Statement (DEIS) Colorado River Management Plan (CRMP) of Grand Canyon National Park

AGENCY: National Park Service, Department of the Interior.

SUMMARY: This notice informs the public that the comment period for the Draft Environmental Impact Statement for the Colorado River Management Plan is extended.

DATES: The comment period for the draft EIS has been extended three weeks from the published date of the Notice of Availability. The extended deadline is February 1, 2004.

ADDRESSES: Address comments and requests for more information to: Superintendent, Grand Canyon National Park, Attn: CRMP Comments, P.O. Box 129, Grand Canyon, Arizona 86023, via e-mail at *grca_crmp@nps.gov* or visit the Web site at *http://www.nps.gov/crca/crmp.*

FOR FURTHER INFORMATION CONTACT: Rick Ernenwein at (928) 779–6279 or Mary Killeen at (928) 638–7885.

SUPPLEMENTARY INFORMATION: The authority to revise the Colorado River Management Plan (CRMP) came as a result of a year-long negotiation to settle a lawsuit filed against the Park in U.S. District Court in Arizona in July, 2000. The settlement agreement directed the NPS to address specific issues including allocation of use between commercial and non-commercial users, and level of motorized rafting use. Given the complexity of the document and the intense level of interest, the comment period is being extended. The Park Service published the Notice of Availability of the Draft EIS in the **Federal Register** of October 1, 2004 (Vol. 69, No. 190). The notice stated that the Draft EIS would remain available for 90 days from the publication of the notice. The Park Service published the Notice of Availability in the EPA Federal Register Environmental Documents on October 8, 2004 (EIS No. 040465).

Dated: December 21, 2004.

Kate Cannon,

Deputy Superintendent, Grand Canyon National Park.

[FR Doc. 05–609 Filed 1–10–04; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[Docket No. ATF 15N; ATF O 1156.3]

Delegation Order—Authority To Issue Reimbursable Work Authorizations

1. *Purpose.* This order delegates authority for issuing General Services Administration (GSA) Form 2957, Reimbursable Work Authorizations, when required for alterations, renovations, repairs or services to real property occupied by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

2. *Cancellation.* This order cancels ATF O 1100.139A, Delegation Order—Authority To Issue Reimbursable Work Authorizations, dated 8/13/1991.

3. *Delegations.*

a. Under the authority vested in the Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, by Department of Justice Final Rule [AG Order No. 2650–2003] as published in the **Federal Register** on January 31, 2003, and by title 28 CFR 0.130 and 0.131, I hereby delegate the authority for issuing reimbursable work authorizations to GSA when required for alterations, renovations, repairs or services to real property occupied by ATF to:

(1) Assistant Director (Management)/CFO.

(2) Chief, Administrative Programs Division.

(3) Chief, Space Management Branch.

b. The authority delegated herein may not be redelegated.

4. *Questions.* Questions regarding this order should be addressed to the Chief, Space Management Branch at 202–927–8840.

Dated: December 21, 2004.

Carl J. Truscott,

Director.

[FR Doc. 05–517 Filed 1–10–05; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[Docket No. ATF 16N; ATF O 1156.2]

Delegation Order—Authority to Issue Space Requests to General Services Administration (GSA)

1. *Purpose.* This order delegates authority for issuing requests for space on StandardForm 81, Request for Space.

2. *Cancellation.* This order cancels ATF O 1100.140B, Delegation Order—Authority To Issue Space Requests to GSA, dated 8/31/1991.

3. *Delegations.*

a. Under the authority vested in the Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, by Department of Justice Final Rule [AG Order No. 2650–2003] as published in the **Federal Register** on January 31, 2003, and by title 28 CFR 0.130 and 0.131, I hereby delegate the authority for issuing requests for space, in accordance with GSA regulations to:

(1) Assistant Director (Management)/CFO.

(2) Chief, Administrative Programs Division.

(3) Chief, Space Management Branch.

b. The authority delegated herein may not be redelegated.

4. *Questions.* Questions regarding this order should be addressed to the Chief, Space Management Branch at (202) 927–8840.

Dated: December 21, 2004.

Carl J. Truscott,

Director.

[FR Doc. 05–518 Filed 1–10–05; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: used body armor wear and tear questionnaire.

The Department of Justice (DOJ), Office of Justice Programs (OJP) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 69, Number 179, page 55838 on September 16, 2004, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until February 10, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Used Body Armor Wear and Tear Questionnaire.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form Number: N/A. National Institute of Justice, Office of Justice Programs, United States Department of Justice is sponsoring the collection.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local, or Tribal Government. Other: Federal Government. Abstract: Pursuant to the Attorney General's Body Armor Safety Initiative, NIJ is collecting samples of used body armor to determine the cause of ballistic resistance degradation in body armor. The information collected in the questionnaire concerns the usage of each unit of body armor submitted for testing and will contribute to an analysis of the causes of ballistic resistance degradation.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take each of the 500 respondents approximately 15 minutes to complete the questionnaire.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden to complete the certification form is 125 hours.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 05–480 Filed 1–10–05; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Advisory Board Meeting

Time and Date: 8 a.m. to 4 p.m. on Monday, January 24, 2005, 8 a.m. to 12 p.m. on Tuesday, January 25, 2005.

Place: The Holiday Inn on The Hill, 415 New Jersey Avenue, NW., Washington, DC 20001.

Status: Open.

Matters To Be Considered: Mentally Ill Offender; Assessing the Effectiveness of Faith-Based Organizations; Health and Human Services—Children & Families; Quarterly Report by Office of Justice Programs.

FOR FURTHER INFORMATION CONTACT: Contact Larry Solomon, Deputy Director, (202) 307–3106, ext. 44254.

Morris Thigpen,

Director.

[FR Doc. 05–452 Filed 1–10–05; 8:45 am]

BILLING CODE 4410–36–M

NATIONAL INSTITUTE FOR LITERACY

National Institute for Literacy Advisory Board

AGENCY: National Institute for Literacy.

ACTION: Notice of a partially closed meeting.

SUMMARY: This notice sets forth the schedule and a summary of the agenda for an upcoming meeting of the National Institute for Literacy Advisory Board (Board). The notice also describes the functions of the Board. Notice of this meeting is required by section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend the meeting. Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.*, interpreting services, assistive listening devices, or materials in alternative format) should notify Liz Hollis at telephone number (202) 233–2072 no later than January 18, 2005. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Date and Time: Open sessions—February 2, 2005, from 8:30 a.m. to 5 p.m. and February 3, 2005, from 9:20 a.m. to 5 p.m. Closed sessions—February 3, 2005, from 8:30 a.m. to 9:15 a.m.

ADDRESSES: National Institute for Literacy, 1775 I Street, NW., Suite 730, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Liz Hollis, Special Assistant to the Director; National Institute for Literacy, 1775 I Street, NW., Suite 730, Washington, DC 20006; telephone number: (202) 233–2072; e-mail: *ehollis@nifl.gov.*

SUPPLEMENTARY INFORMATION: The Board is established under section 242 of the Workforce Investment Act of 1998, Public Law 105–220 (20 U.S.C. 9252). The Board consists of ten individuals appointed by the President with the advice and consent of the Senate. The Board advises and makes recommendations to the Interagency Group. The Interagency Group is composed of the Secretaries of Education, Labor, and Health and Human Services, and the three Secretaries administer the National Institute for Literacy (Institute). The Interagency Group considers the Board's recommendations in planning the goals of the Institute and in implementing any programs to achieve those goals. Specifically, the Board performs the following functions: (a) Makes recommendations concerning the appointment of the Director and the staff of the Institute; (b) provides independent advice on operation of the Institute; and (c) receives reports from the Interagency Group and the Institute's Director.

The National Institute for Literacy Advisory Board will meet February 2–3, 2005. On February 2, 2005 from 8:30 a.m. to 5 p.m. and February 3, 2005 from 9:20 a.m. to 5 p.m., an open meeting will be held to discuss the Institute's performance measures; gather information on current issues in adolescent literacy and other literacy issues; and other Board business as necessary. On February 3, 2005 from 8:30 a.m. to 9:15 a.m., the Board meeting will be closed to the public to discuss personnel issues, including the search for a permanent director for NIFL. This discussion relates to the internal personnel rules and practices of the Institute and is likely to disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. The discussion must therefore be held in closed session under exemptions 2 and 6 of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (6). A summary of the activities at the closed session and related matters that are informative to the public and consistent with the policy of 5 U.S.C. 552b will be available to the public within 14 days of the meeting.

Records are kept of all Advisory Board proceedings and are available for public inspection at the National Institute for Literacy, 1775 I Street, NW., Suite 730, Washington, DC 20006, from 8:30 a.m. to 5 p.m.

Dated: January 7, 2005.

Lynn Reddy,

Acting Interim Director.

[FR Doc. 05–601 Filed 1–7–05; 12:40 pm]

BILLING CODE 6055–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–33765, License No. 24–26628–01, EA–04–178]

KTL Roudebush Testing, Kansas City, MO; Order Revoking License

I

KTL Roudebush Testing (Licensee) is the holder of Byproduct Material License No. 24–26628–01 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR parts 30 and 34. The license authorizes the possession and use of iridium-192 in sealed sources for industrial radiography. The license also authorizes the possession and use of cesium-137 and americium-241 in sealed sources to be used in portable gauges for measuring physical properties of materials. In addition, the license authorizes the possession of depleted uranium, as solid metal, for shielding in radiography equipment.

Christopher V. Roudebush is the President and owner of KTL Roudebush Testing. The license identifies Mr. Roudebush as the Radiation Safety Officer (RSO). Mr. Roudebush also serves as a radiographer for the Licensee. The license was originally issued on November 20, 1995. License Amendment No. 4 was issued on January 16, 2004, to change the name of the Licensee from PSI Inspection, Inc. to KTL Roudebush Testing. The license was amended in its entirety on February 5, 2004 (Amendment No. 5), and is due to expire on March 31, 2011. The license was suspended by NRC Order on March 11, 2004 (EA–03–0177) (69 FR 13336). That Order was made immediately effective.

II

On March 11, 2004, the NRC issued an Order Suspending License (Effective Immediately) and Demand for Information to KTL Roudebush Testing after a routine inspection by the NRC staff and an investigation by the NRC Office of Investigations (OI) identified numerous apparent deliberate violations of the NRC's radiation safety requirements by Christopher V. Roudebush, the President, owner, and

Radiation Safety Officer of, and a radiographer for, KTL Roudebush Testing. The apparent violations were described in Inspection Report No. 030–33765/2003–001 (DNMS), OI Report No. 3–2003–009, and the Order Suspending License (Effective Immediately) issued on March 11, 2004. The Suspension Order required KTL Roudebush Testing to suspend its use of NRC-licensed material and to place the material in safe storage pending further deliberation by the NRC regarding the apparent violations. The apparent deliberate violations giving rise to the Order Suspending License were described therein and, in summary, included the following:

1. On April 10, 2003, October 28 and 29, 2002, and on several occasions between October 2001 and January 2002, Mr. Roudebush deliberately conducted industrial radiography at locations other than a permanent radiographic installation (field locations or temporary job sites) without having an additional qualified individual present who could observe radiographic operations and was capable of providing immediate assistance to prevent unauthorized entry, as required by 10 CFR 34.41.

2. On April 10, 2003, and on October 28 and 29, 2002, Mr. Roudebush deliberately permitted individuals to act as a radiographer's assistant before these individuals had successfully completed the Licensee's training program for radiographer's assistants, as required by 10 CFR 34.43(c) and Condition No. 26 of NRC License No. 24–26628–01.

3. On October 28, 2002, Mr. Roudebush deliberately permitted an individual who was not wearing a direct-reading pocket dosimeter, an alarming ratemeter, and either a film badge or a thermoluminescent dosimeter, as required by 10 CFR 34.47(a), to act as a radiographer's assistant.

4. As of April 12, 2003, Mr. Roudebush deliberately failed to conduct inspections and routine maintenance of Licensee radiographic exposure devices and associated equipment during the first quarter of Calendar Year 2003, an interval exceeding three months, as required by 10 CFR 34.31(b).

5. On April 8, 2003, Mr. Roudebush deliberately provided inaccurate and incomplete information to an NRC inspector about maintaining records of quarterly inspections of radiographic exposure devices, as required to be maintained in accordance with 10 CFR 34.73.

6. On August 5, 2003, in response to a subpoena from the NRC, Mr. Roudebush deliberately provided inaccurate and incomplete information to a Special Agent of the NRC Office of Investigations when he stated that he had destroyed a computer described in a subpoena from the NRC. Mr. Roudebush deliberately failed to afford the Commission an opportunity to inspect records of quarterly maintenance and inspections of radiographic exposure devices that were required to be maintained in accordance with 10 CFR 34.73.

7. On April 10, 2003, and between October 2001 and January 2002, Mr. Roudebush transported on public highways a SPEC Model 150 radiographic exposure device (package), containing a nominal 142 curie iridium-192 sealed source, and he deliberately did not block and brace the package such that it could not change position during conditions normally incident to transportation, as required by 10 CFR 71.5(a) and 49 CFR 177.842(d). Specifically, two radiographic exposure devices were transported in the back of a company truck and one of the exposure devices was not properly blocked or braced.

8. On April 10, 2003, Mr. Roudebush deliberately transported a SPEC Model 150 radiographic exposure device, containing a nominal 142 curie iridium-192 sealed source, by highway without a shipping paper and the material was not excepted from shipping paper requirements, as required by 10 C.F.R. § 71.5(a) and 49 CFR 177.817(a).

9. On April 10, 2003, Mr. Roudebush deliberately transported a radiographic exposure device, containing a nominal 142 curie iridium-192-sealed source, without its safety cover installed to protect the source assembly from water, mud, sand or other foreign matter, as required by 10 CFR 34.20(c)(3).

III

The March 11, 2004, Order Suspending License also contained a Demand for Information issued pursuant to 10 CFR 2.204. The Demand for Information required the Licensee to provide in writing, under oath or affirmation, an explanation as to why, in light of the inspection and investigation findings, that License No. 24–26628–01 should not be revoked. The Demand for Information also provided that should the Licensee believe that the license should not be revoked, the Licensee must provide in a written response, under oath or affirmation, reasonable assurance that in the future all licensed activities will be conducted with appropriate management oversight to ensure all licensed activities will be performed in accordance with regulatory requirements. By letter dated March 17, 2004, the Licensee requested additional time to respond to the Demand for Information. The NRC granted the request for additional time on April 2, 2004. On June 3, 2004, the Licensee provided the written response required by the Demand for Information and also requested a hearing on the Order Suspending License.

On June 14, 2004, the Licensee withdrew the request for hearing upon the NRC granting the Licensee's request to meet with the NRC staff, and consequently the NRC staff extended the time for the Licensee to request a hearing on the Order Suspending License. Representatives of the Licensee met with the NRC staff on July 21, 2004, in the NRC Region III Office in Lisle, Illinois.

In the Licensee's undated [1] written response to the Demand for Information and at the meeting with the NRC staff, Christopher V. Roudebush, the President, owner, and Radiation Safety Officer of KTL Roudebush Testing, stated that he made mistakes and he had lapses in judgment as a businessman; however, none of the violations were deliberate in nature. Mr. Roudebush stated that he planned to hire only experienced individuals in the future and he would no longer hire individuals from a temporary labor agency. According to Mr. Roudebush, he hired a second radiographer to be an additional Radiation Safety Officer in order to help with completion of NRC-required inspections and audits and maintain related records. (**Note:** On December 20, 2003, the Licensee submitted a license amendment request to the NRC, requesting an individual be added to the license as the Assistant Radiation Safety Officer. License Amendment No. 4 was issued on January 16, 2004, and listed that individual as the Assistant Radiation Safety Officer.)

The NRC staff carefully considered the Licensee's response to the Demand for Information and the additional information provided during the meeting held on July 21, 2004. Notwithstanding the Licensee's arguments, the NRC concludes that the apparent deliberate violations specified in the Suspension Order occurred as stated. For example, Mr. Roudebush admitted in the response to the Demand for Information and at the July 21, 2004, meeting that he violated the NRC requirement to have two qualified individuals present during radiographic operations; however, he denied that the violation was deliberate. He explained

[1] Received by NRC on June 3, 2004.

that he received his training and certification as a radiographer in the State of Texas and the regulations in the State of Texas required only one certified radiographer. He also denied during the meeting on July 21, 2004, that he had received a prior Notice of Violation associated with the ''two-man rule,'' 10 CFR 34.41(a). However, the NRC issued a Notice of Violation to the Licensee on January 18, 2000, associated with the ''two man rule,'' 10 CFR 34.41(a). The inspection report containing the violation (No. 030–33765/99–001(DNMS)) documents that Mr. Roudebush told an NRC inspector during the December 10, 1999, inspection that he was familiar with the NRC's ''two man rule,'' 10 CFR 34.41(a). Therefore, the NRC staff concludes that the statements by Mr. Roudebush that he was not aware of the requirement to have two qualified individuals present at a temporary job site and he did not deliberately violate the provisions of 10 CFR 34.41(a), were not credible.

Additionally, Mr. Roudebush provided a lengthy explanation regarding the apparent deliberate failure to provide the information requested by the NRC subpoena, the opportunity to inspect the records contained in the computer, and the destruction of that computer. Mr. Roudebush stated that an employee threw computer parts from a truck operated by Mr. Roudebush after Mr. Roudebush had received the subpoena from the Office of Investigations. Mr. Roudebush admitted that he was present when his employee threw away the computer parts and stated that he made no attempt to stop the employee from destroying the computer. Regardless of who may have actually destroyed the computer, Mr. Roudebush, as the Licensee's President, owner, and Radiation Safety Officer, was complicit in, and responsible for, deliberate violations of 10 CFR 30.9 and 10 CFR 30.52(b).

The NRC staff carefully considered the Licensee's explanations provided in its response to the Demand for Information and at the July 21, 2004, meeting regarding the other violations alleged in the Suspension Order. While Mr. Roudebush contends that his conduct reflected mistakes and lapses of judgment, the NRC concludes that the violations were deliberate and occurred as stated in the Order Suspending License.

IV

In addition to the deliberate violations described in Section III which occurred within the NRC's jurisdiction, and upon which this Order is based, the investigation conducted by the NRC Office of Investigations determined that the following activities occurred in the State of Kansas, an NRC Agreement State. On February 17, and March 6, 2003, and on several occasions between May and October 2002, the Licensee deliberately conducted radiography at temporary job sites and the radiographer was not accompanied by an additional qualified individual. On February 17, and March 6, 2003, the Licensee deliberately permitted individuals to act as a radiographer's assistants before they had successfully completed the Licensee's training program for a radiographer's assistant, and these individuals did not wear a direct-reading pocket dosimeter, an alarming ratemeter, and either a film badge or a thermoluminescent dosimeter while conducting radiography. Based on these findings, on March 12, 2004, the State of Kansas issued an Emergency Order of Suspension of License (Case No. 04–E–0071) to KTL Inspection (as named on the Order and License). The license in the State of Kansas expired on June 30, 2004, and summary judgment was entered without further action by the State of Kansas based on the expiration of the license.

V

As described in Section III, the deliberate acts and omissions of Christopher V. Roudebush violated NRC requirements over an extended period of time. These violations jeopardized the public health and safety, and on that basis, represent a significant regulatory concern. The deliberate violations also demonstrate that Christopher V. Roudebush, as the President, owner, and Radiation Safety Officer of KTL Roudebush Testing, and a radiographer for the Licensee, is unable to comply with the Commission's requirements to protect the public health and safety. The corrective actions described by Mr. Roudebush (hiring an Assistant Radiation Safety Officer/radiographer, and stating he would not hire temporary workers in the future) are not sufficient to demonstrate otherwise. The deliberate violations demonstrate that the Commission is not able to rely upon the integrity of Mr. Roudebush. Such reliance is essential to assuring adequate protection of the public health and safety. Given the above matters and the actions of Mr. Roudebush as the President, owner, and Radiation Safety Officer for the Licensee, the Commission lacks the requisite reasonable assurance that the public health and safety is adequately protected by continuing activities under the existing license. If, at the time the license was issued, the NRC had known of the Licensees inability to control licensed activities in accordance with the Commission's requirements, or the questionable integrity of the Licensee's President and Radiation Safety Officer, the license would not have been issued. Therefore, I have determined that permitting this Licensee to conduct or resume activities under License No. 24–26628–01 would be contrary to the public health and safety and that this license should be revoked. I have also determined, pursuant to 10 CFR 2.202(a)(5), that the public health and safety requires the continued suspension of this license until the material in the Licensee's possession has been returned to the manufacturer or transferred to another person authorized to possess the material, and that this continued suspension must remain in effect pending license revocation.

VI

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR 30 and 34:

A. It is hereby ordered, that:

1. The Licensee shall transfer all NRC-licensed material acquired or possessed under the authority of License No. 24–26628–01 within 20 days of the date of this Order, either by returning the material to the manufacturer or transferring it to another person authorized to possess that material;

2. Any sources that have not been leak tested within six months prior to the transfer shall be leak tested by a person authorized to do so, prior to transfer of the source;

3. The Licensee shall notify Mr. Marc L. Dapas, Director, Division of Nuclear Materials Safety, NRC Region III, Lisle, Illinois, by telephone (630–829–9800) at least five working days prior to the date the radioactive materials are to be transferred so that the NRC may, if it elects, observe the transfer of the material;

4. The Licensee shall, within 5 days after transfer of the material, certify in writing, under oath or affirmation, to the Regional Administrator, NRC Region III, 2443 Warrenville Road, Suite 210, Lisle, Illinois 60532–4532, that all material has been properly transferred and provide the Regional Administrator copies of transfer records required by 10 CFR 30.51; and

5. The issuance of this Order does not otherwise alter the continued effectiveness of the Suspension Order.

B. It is further ordered that:

Following confirmation of the transfer of all NRC-licensed material currently

possessed, as discussed above, License No. 24–26628–01 is revoked.

The Director of the Office of Enforcement or the Regional Administrator, Region III, may, in writing, at any time prior to final agency action sustaining the revocation of License No. 24–26628–01, relax or rescind any of the above provisions on demonstration by the Licensee, in writing and under oath or affirmation, of good cause.

VII

In accordance with 10 CFR 2.202(b), the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically admit or deny each allegation or charge made in this Order and set forth the matters of fact and law on which the Licensee or other person adversely affected relies, and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies of the hearing request also should be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, to the Assistant General Counsel for Materials Litigation and Enforcement, Office of the General Counsel, at the same address, to the Regional Administrator, NRC Region III, 2443 Warrenville Road, Suite 210, Lisle, IL 60532–4352, and to the Licensee if the hearing request is by a person other than the Licensee. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Assistant General Counsel either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which the interest of the person is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309.

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section VI above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section VI shall be final when the extension expires if a hearing request has not been received.

Dated this 30th day of December, 2004.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Deputy Executive Director for Materials, Research and State Programs, Office of Executive Director for Operations.

[FR Doc. 05–477 Filed 1–10–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[IA–04–019]

Christopher V. Roudebush; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)

I

KTL Roudebush Testing (Licensee) is the holder of Byproduct Material License No. 24–26628–01 issued by the U.S. Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR 30 and 34. The license authorizes the possession and use of iridium–192 in sealed sources for industrial radiography. The license also authorizes the possession and use of cesium-137 and americium-241 in sealed sources to be used in portable gauges for measuring physical properties of materials. In addition, the license authorizes the possession of depleted uranium, as solid metal, for shielding in radiography equipment. The license was originally issued on November 20, 1995. License Amendment No. 4 was issued on January 16, 2004, to change the name of the Licensee from PSI Inspection, Inc. to KTL Roudebush Testing. The license was amended in its entirety on February 5, 2004 (Amendment No. 5) and is due to expire on March 31, 2011. The license was suspended by NRC Order on March 11, 2004 (EA–03–0177) (69 FR 13336), which was effective immediately. Additionally, the NRC staff informed the Licensee, on September 15, 2004, that an extension of time for requesting a hearing on the March 11, 2004, Order Suspending License was granted until 20 days following the final disposition of the issues described in the Suspension Order. Christopher V. Roudebush is the President and owner of KTL Roudebush Testing. The license identifies Mr. Roudebush as the Radiation Safety Officer (RSO). Mr. Roudebush also serves as a radiographer for the Licensee.

II

Based on the results of a routine inspection by the NRC staff and an investigation by the NRC Office of Investigations (OI), the NRC determined that Christopher V. Roudebush, the President, owner, Radiation Safety Officer of, and a radiographer for, KTL Roudebush Testing, engaged in deliberate misconduct that caused the Licensee to be in violation of numerous NRC radiation safety requirements, including the requirements to: have a sufficient number of qualified personnel present at temporary job sites; provide radiation safety training and dosimetry to employees; conduct inspections and maintenance of industrial radiography equipment at specified intervals; and maintain records of NRC required inspection and maintenance activities. The NRC also determined that Mr. Roudebush deliberately provided incomplete and inaccurate information to NRC inspectors and investigators, and Mr. Roudebush deliberately prevented NRC inspectors and investigators from having access to NRC-required records.

As a result of the activities of Mr. Roudebush, the NRC issued an Order Suspending License (Effective Immediately) and Demand for Information to KTL Roudebush Testing on March 11, 2004. The apparent violations were described in Inspection Report No. 030–33765/2003–001 (DNMS), OI Report No. 3–2003–009, and the Order Suspending License (Effective Immediately) issued on March 11, 2004. The Suspension Order required KTL Roudebush Testing to suspend its use of NRC-licensed material and to place the material in safe storage pending further deliberation by the NRC regarding the apparent deliberate violations. The apparent deliberate violations giving rise to the Order Suspending License were

described therein and, in summary, included the following:

1. On April 10, 2003, October 28 and 29, 2002, and on several occasions between October 2001 and January 2002, Mr. Roudebush deliberately conducted industrial radiography at locations other than a permanent radiographic installation (field locations or temporary job sites) without having an additional qualified individual present who could observe the radiographic operations and was capable of providing immediate assistance to prevent unauthorized entry, as required by 10 CFR 34.41.

2. On April 10, 2003, and on October 28 and 29, 2002, Mr. Roudebush deliberately permitted individuals to act as a radiographer's assistant before these individuals had successfully completed the Licensee's training program for radiographer's assistants, as required by 10 CFR 34.43(c) and Condition No. 26 of NRC License No. 24–26628–01.

3. On October 28, 2002, Mr. Roudebush deliberately permitted an individual who was not wearing a direct-reading pocket dosimeter, an alarming ratemeter, and either a film badge or a thermoluminescent dosimeter, as required by 10 CFR 34.47(a), to act as a radiographer's assistant.

4. As of April 12, 2003, Mr. Roudebush deliberately failed to conduct inspections and routine maintenance of Licensee radiographic exposure devices and associated equipment during the first quarter of Calendar Year 2003, an interval exceeding three months, as required by 10 CFR 34.31(b).

5. On April 8, 2003, Mr. Roudebush deliberately provided inaccurate and incomplete information to an NRC inspector about maintaining records of quarterly inspections of radiographic exposure devices, as required to be maintained in accordance with 10 CFR 34.73.

6. On August 5, 2003, in response to a subpoena from the NRC, Mr. Roudebush deliberately provided inaccurate and incomplete information to a Special Agent of the NRC Office of Investigations when he stated that he had destroyed a computer described in a subpoena from the NRC. Mr. Roudebush deliberately failed to afford the Commission an opportunity to inspect records of quarterly maintenance and inspections of radiographic exposure devices that were required to be maintained in accordance with 10 CFR 34.73.

7. On April 10, 2003, and between October 2001 and January 2002, Mr. Roudebush transported on public highways a SPEC Model 150 radiographic exposure device (package), containing a nominal 142 curie iridium-192 sealed source, and he deliberately did not block and brace the package such that it could not change position during conditions normally incident to transportation, as required by 10 CFR 71.5(a) and 49 CFR 177.842(d). Specifically, two radiographic exposure devices were transported in the back of a company truck and one of the exposure devices was not properly blocked or braced.

8. On April 10, 2003, Mr. Roudebush deliberately transported a SPEC Model 150 radiographic exposure device, containing a nominal 142 curie iridium-192 sealed source, by highway without a shipping paper and the material was not excepted from shipping paper requirements, as required by 10 CFR 71.5(a) and 49 CFR 177.817(a).

9. On April 10, 2003, Mr. Roudebush deliberately transported a radiographic exposure device, containing a nominal 142 curie iridium-192-sealed source, without its safety cover installed to protect the source assembly from water, mud, sand or other foreign matter, as required by 10 CFR 34.20(3).

III

The March 11, 2004, Order Suspending License also contained a Demand for Information issued pursuant to 10 CFR 2.204. The Demand for Information required the Licensee to provide in writing, under oath or affirmation, an explanation as to why, in light of the inspection and investigation findings, License No. 24–26628–01 should not be revoked. The Demand for Information also provided that should the Licensee believe that the license should not be revoked, the Licensee must provide in a written response, under oath or affirmation, reasonable assurance that in the future all licensed activities will be conducted with appropriate management oversight to ensure all licensed activities will be performed in accordance with regulatory requirements. By letter dated March 17, 2004, the Licensee requested additional time to respond to the Demand for Information. The NRC granted the request for additional time on April 2, 2004. On June 3, 2004, the Licensee provided the written response required by the Demand for Information and also requested a hearing on the Order Suspending License.

On June 14, 2004, the Licensee withdrew the request for hearing upon the NRC granting the Licensee's request to meet with the NRC staff, and consequently the NRC staff extended the time for the Licensee to request a hearing on the Order Suspending License. Representatives of the Licensee met with the NRC staff on July 21, 2004, in the NRC Region III Office in Lisle, Illinois.

In the Licensee's written response to the Demand for Information and at the July 21, 2004, meeting with the NRC staff, Christopher V. Roudebush, the President, owner, and Radiation Safety Officer of KTL Roudebush Testing, stated that he made mistakes and he had lapses in judgment as a businessman; however, none of the violations were deliberate in nature. Mr. Roudebush stated that he planned to hire only experienced individuals in the future and he would no longer hire individuals from a temporary labor agency. According to Mr. Roudebush, he hired a second radiographer to be an additional Radiation Safety Officer in order to help with the completion of NRC-required inspections and audits and the maintenance of related records.

(Note: On December 20, 2003, the Licensee submitted a license amendment request to the NRC, requesting an individual be added to the license as the Assistant Radiation Safety Officer. License Amendment No. 4 was issued on January 16, 2004, and listed that individual as the Assistant Radiation Safety Officer.)

The NRC staff carefully considered the Licensee's response to the Demand for Information and the additional information provided during the meeting held on July 21, 2004. Notwithstanding the Licensee's arguments, the NRC concludes that the apparent deliberate violations specified in the Suspension Order occurred as stated. For example, Mr. Roudebush admitted in the response to the Demand for Information and at the July 21, 2004, meeting, that he violated the NRC requirement to have two qualified individuals present during radiographic operations; however, he denied that the violation was deliberate. He explained that he received his training and certification as a radiographer in the State of Texas and the regulations in the State of Texas required only one certified radiographer. He also denied during the meeting on July 21, 2004, that he had received a prior Notice of Violation associated with the ''two-man rule,'' 10 CFR 34.41(a). However, the NRC issued a Notice of Violation to the Licensee on January 18, 2000, associated with the ''two man rule,'' 10 CFR 34.41(a). The inspection report containing the violation (No. 030–33765/99–001(DNMS)) documents that Mr. Roudebush told an NRC inspector during the December 10, 1999, inspection that he was familiar with the

NRC's ''two man rule,'' 10 CFR 34.41(a). Therefore, the NRC staff concludes that the statements by Mr. Roudebush that he was not aware of the NRC requirement to have two qualified individuals present at a temporary job site and he did not deliberately violate the provisions of 10 CFR 34.41(a) were not credible.

Additionally, Mr. Roudebush provided a lengthy explanation regarding the apparent deliberate failure to provide the information requested by the NRC subpoena, the opportunity to inspect the records contained in the computer, and the destruction of that computer. Mr. Roudebush stated that an employee threw computer parts from a truck operated by Mr. Roudebush after Mr. Roudebush had received the subpoena from the Office of Investigations. Mr. Roudebush admitted that he was present when his employee threw away the computer parts and he stated that he made no attempt to stop the employee from destroying the computer. Regardless of who may have actually destroyed the computer, Mr. Roudebush, as the Licensee's President, owner, and Radiation Safety Officer, was complicit in, and responsible for, deliberate violations of 10 CFR 30.9 and 10 CFR 30.52(b).

The NRC staff carefully considered the Licensee's explanations provided in its response to the Demand for Information and at the meeting on July 21, 2004, regarding the other violations alleged in the Suspension Order. While Mr. Roudebush contends that he merely made mistakes and had lapses of judgment, the NRC concludes that the violations were deliberate and occurred as stated in the Order Suspending License. Therefore, an Order Revoking License was issued to KTL Roudebush Testing on December 30, 2004.

IV

In addition to the deliberate violations described in Section III which occurred within the NRC's jurisdiction, and upon which this Order is based, the investigation conducted by the NRC Office of Investigations determined that the following activities occurred in the State of Kansas, an NRC Agreement State. On February 17, and March 6, 2003, and on several occasions between May and October 2002, the Licensee deliberately conducted radiography at temporary job sites and the radiographer was not accompanied by an additional qualified individual. On February 17, and March 6, 2003, the Licensee deliberately permitted individuals to act as a radiographer's assistants before they had successfully completed the Licensee's training program for a radiographer's assistant, and these individuals did not wear a direct-reading pocket dosimeter, an alarming ratemeter, and either a film badge or a thermoluminescent dosimeter while conducting radiography. Based on these findings, on March 12, 2004, the State of Kansas issued an Emergency Order of Suspension of License (Case No. 04–E–0071) to KTL Inspection (as named on the Order and License). The license in the State of Kansas expired on June 30, 2004. Based on expiration of the license, summary judgment was entered without further action by the State of Kansas.

V

As described in Section II and Section III, the deliberate acts and omissions of Christopher V. Roudebush violated NRC requirements over an extended period of time. These violations jeopardized the public health and safety, and on that basis, represent a significant regulatory concern. The deliberate violations also demonstrate that Mr. Roudebush is unable to comply with the Commission's requirements to protect the public health and safety, and the Commission is not able to rely upon the integrity of Mr. Roudebush. Such reliance is essential to assuring adequate protection of the public health and safety. Consequently, I lack the requisite reasonable assurance that licensed activities can be conducted in compliance with the Commission's requirements and that the health and safety of the public will be protected if Mr. Roudebush is permitted to be involved in NRC-licensed activities. Therefore, the public health, safety and interest require that Christopher V. Roudebush be prohibited from any involvement in NRC-licensed activities for a period of five years from the date of this Order. Additionally, Mr. Roudebush is required to notify the NRC of his first employment in NRC-licensed activities for a period of five years following the prohibition period. Furthermore, pursuant to 10 CFR 2.202(a)(5), I find that the significance of Mr. Roudebush's conduct described above is such that the public health, safety and interest require that this Order be immediately effective.

VI

Accordingly, pursuant to sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR 30.10, and 10 CFR 150.20, *it is hereby ordered*, effective immediately, *that*:

A. 1. Christopher V. Roudebush is prohibited for five years from the date of this Order from engaging in NRC-licensed activities. NRC-licensed activities are those activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State Licensees conducted pursuant to the authority granted by 10 CFR 150.20.

2. Mr. Roudebush is permitted to conduct licensed activities as necessary to maintain licensed material in the possession of KTL Roudebush Testing in safe storage, as required by the March 11, 2004, Order Suspending License (Effective Immediately), and to transfer the material to an authorized recipient, as required by the December 30, 2004, Order Revoking License.

B. If Mr. Roudebush is currently involved with another licensee in NRC-licensed activities, he must immediately cease those activities, and inform the NRC of the name, address and telephone number of the employer, and provide a copy of this Order to the employer.

C. For a period of five years after the five year period of prohibition has expired, Mr. Roudebush shall, within 20 days of acceptance of his first employment offer involving NRC-licensed activities or his becoming involved in NRC-licensed activities, as defined in Paragraph VI.A. above, provide notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities. In the notification, Mr. Roudebush shall include a statement of his commitment to compliance with regulatory requirements and the basis why the Commission should have confidence that he will now comply with applicable NRC requirements.

The Director of the Office of Enforcement or the Regional Administrator, Region III, may, in writing, relax or rescind any of the above conditions upon demonstration by Mr. Roudebush of good cause.

VII

In accordance with 10 CFR 2.202(b), Christopher V. Roudebush must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause

for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically admit or deny each allegation or charge made in this Order and shall set forth the matters of fact and law on which Mr. Roudebush or other person adversely affected relies, and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Attn: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement, Office of the General Counsel, at the same address, to the Regional Administrator, NRC Region III, 2443 Warrenville Road, Suite 210, Lisle, IL 60532–4352, and to Mr. Roudebush if the answer or hearing request is by a person other than Mr. Roudebush. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to (301) 415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Assistant General Counsel either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. If a person other than Mr. Roudebush requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309.

If a hearing is requested by Mr. Roudebush or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(I), Mr. Roudebush, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this Order.

Dated this 30th day of December, 2004.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Deputy Executive Director for Materials, Research and State Programs, Office of Executive Director for Operations.

[FR Doc. 05–478 Filed 1–10–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–11]

Sacramento Municipal Utility District; Rancho Seco Independent Spent Fuel Storage Installation; Issuance of Environmental Assessment and Finding of No Significant Impact Regarding a Proposed Exemption and Conforming Amendment

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment.

FOR FURTHER INFORMATION CONTACT: Amy M. Snyder, Project Manager, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 415–8580; fax number: (301) 425–8555; e-mail: *ams3@nrc.gov*.

SUPPLEMENTARY INFORMATION: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption, pursuant to 10 CFR 72.7, from the provisions of 10 CFR 72.44(d)(3), to the Sacramento Municipal Utility District (SMUD or the licensee). The requested exemption (in conjunction with a conforming license amendment) would relieve SMUD from the requirement to submit an annual radioactive effluent report for the Rancho Seco Independent Spent Fuel Storage Installation (ISFSI). SMUD submitted the exemption request by letter dated July 19, 2004, in which it also requested an amendment to the Rancho Seco ISFSI license; specifically, the deletion of Technical Specification 5.5.2., Radiological Environmental Monitoring Program, item (d). The licensee is currently storing spent nuclear fuel at the Rancho Seco ISFSI on the site of the decommissioned Rancho Seco Nuclear Generating Station in Sacramento County, California.

Environmental Assessment (EA)

Identification of Proposed Action: SMUD has requested both an exemption and a conforming license amendment to obtain relief from the requirement to submit an annual radioactive effluent report for the Rancho Seco ISFSI. According to 10 CFR 72.44(d), each 10 CFR part 72 license must include technical specifications regarding radioactive effluents. Specifically, 10 CFR 72.44(d)(3) requires that an annual report be submitted to the NRC, specifying the quantity of each of the principal radionuclides released to the environment in liquid and in gaseous effluents during the previous 12 months of ISFSI operation. In addition to the regulation itself, the Rancho Seco ISFSI Technical Specifications (Appendix to License No. SNM–2510), section 5.5.2, Radiological Environmental Monitoring Program, item d., requires an annual report to be submitted pursuant to 10 CFR 72.44(d)(3).

The proposed action before the NRC is whether to grant the exemption and conforming amendment.

Need for the Proposed Action: The requirements of 10 CFR 72.44(d)(3) and Rancho Seco ISFSI Technical Specification 5.5.2.d. impose certain regulatory obligations, with associated costs, on the licensee. In its Safety Evaluation Report related to the ISFSI license, the staff found that there are no credible scenarios by which liquid or gaseous effluents could be released from the dry shielded canister. The licensee further stated that any concerns over small quantities of gaseous or liquid effluent that may be produced during cask loading and transfer decontamination activities are no longer relevant, since all the spent fuel has been transferred to the ISFSI, and that the NUHOMS–24P dry cask storage system used at the Rancho Seco ISFSI is a passive system which, by design, produces no gaseous or liquid effluent.

Granting the requested exemption and approving the conforming amendment will relieve the licensee from the requirement to submit an annual radioactive effluent report pursuant to 10 CFR 72.44(d)(3). The requirement to submit an annual radioactive effluent monitoring report is not needed for this facility in its current configuration and is an unnecessary administrative burden. Thus, the licensee would not have to incur the costs associated with preparing and submitting an annual ISFSI radioactive effluent report.

Environmental Impacts of the Proposed Action: The NRC has reviewed the exemption request submitted by the licensee and determined that not requiring the licensee to submit an annual report pursuant to 10 CFR 72.44(d)(3) is an administrative change and would have no significant impacts to the environment.

Further, NRC has evaluated the impact to public safety that would result in granting the requested exemption. NRC determined that not requiring the licensee to submit an annual report specifying principal radionuclides released to the environment in liquid and in gaseous effluents does not impact pubic safety because the design basis for the Rancho Seco ISFSI is such that it is a passive system that generates no effluents during fuel storage. Thus, there should be no releases to the environment of either liquid or gaseous effluents from normal operations of the Rancho Seco ISFSI.

The proposed actions would not increase the probability or consequences of accidents, no changes would be made to the types of effluents that may be released offsite, and there would be no increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action. Additionally, the proposed action would have no significant non-radiological impacts.

Alternative to the Proposed Action: As an alternative to the proposed action, the staff considered denial of the exemption and conforming amendment requests (*i.e.*, the ''no-action'' alternative). Approval or denial of the exemption and conforming amendment requests would result in no change in the environmental impacts. Therefore, the environmental impacts of the proposed action and the alternative action are similar.

Agencies and Persons Consulted: The NRC staff prepared this environmental assessment (EA); no other sources were used. On September 28, 2004, the staff contacted Mr. Steven Hsu of the California Department of Health Services, Radiologic Health Branch, and subsequently provided him a draft copy of this EA for review. The State of California responded to the NRC by e-mail on October 1, 2004, and stated it had no comments at this time on the EA or the Finding of No Significant Impact. The NRC staff has determined that consultation under Section 7 of the Endangered Species Act is not required for this specific exemption, which involves an administrative change and will not affect listed species or critical habitat. The NRC staff has also determined that the proposed action is not a type of activity having the potential to cause effects on historic properties. Therefore, no consultation is required under Section 106 of the National Historic Preservation Act.

Conclusions: The staff has reviewed the exemption and conforming amendment requests submitted by SMUD and has determined that relieving the licensee from the requirement to submit an annual radioactive effluent report pursuant to 10 CFR 72.44(d)(3) and the Rancho Seco ISFSI Technical Specifications is an administrative change, and would have no significant impact on the environment.

Finding of No Significant Impact

The environmental impacts of the proposed action have been reviewed in accordance with the requirements set forth in 10 CFR Part 51. Based upon the foregoing EA, the NRC finds that the proposed action of granting the exemption and approving the conforming amendment to the license will not significantly impact the quality of the human environment. Accordingly, the NRC has determined that an environmental impact statement for the proposed exemption and conforming amendment is not warranted.

The request for the exemption and amendment was docketed under 10 CFR Part 72, Docket 72–11. For further details with respect to this action, see the request for the exemption and proposed license amendment dated July 19, 2004. The NRC maintains an Agencywide Documents Access Management System (ADAMS), which provides text and image files of NRC's public documents. However, as of October 25, 2004, the NRC initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from the ADAMS database accessible through the NRC's Web site. Interested members of the public should check the NRC's Web pages for updates on the availability of documents through the ADAMS system. When public availability is restored, these documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at: *http://www.nrc.gov/reading-rm/adams.html*. After resumption of public access to ADAMS, copies of the referenced documents will also be available for review at the NRC Public Document Room (PDR), located at 11555 Rockville Pike, Rockville, MD 20852. PDR reference staff can be contacted at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 3rd day of January, 2005.

For the Nuclear Regulatory Commission.

Amy M. Snyder,

Project Manager, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 05–479 Filed 1–10–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of January 10, 17, 24, 31, February 7, 14, 2005.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of January 10, 2005

Tuesday, January 11, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1 & 9).

Wednesday, January 12, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1 & 9).

Week of January 17, 2005—Tentative

There are no meetings scheduled for the Week of January 17, 2005.

Week of January 24, 2005—Tentative

Monday, January 24, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1).

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1, 2, 3, & 4).

Tuesday, January 25, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1).

Week of January 31, 2005—Tentative

Thursday, February 3, 2005

9:30 a.m. Briefing on Human Capital Initiatives (Closed—Ex. 2) (Tentative).

Week of February 7, 2005—Tentative

There are no meetings scheduled for the Week of February 7, 2005.

Week of February 14, 2005—Tentative

Tuesday, February 15, 2005

9:30 a.m. Briefing on Office of Nuclear Material Safety and Safeguards Programs, Performance, and Plans—Waste Safety (Public Meeting)

(Contact: Jessica Shin, (301) 415–8117).

This meeting will be webcast live at the Web address *http://www.nrc.gov.*

1:30 p.m. Briefing on Emergency Preparedness Program Initiatives (Closed—Ex. 1).

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Dave Gamberoni, (301) 415–1651.

* * * * *

ADDITIONAL INFORMATION: By a vote of 3–0 on December 30, 2004, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Affirmation of Motion by Rene Chun for 'Clarification and Amendment' of CLI–04–34'' be held January 5, 2005, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/what-we-do/policy-making/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify the NRC's Disability Program Coordinator, August Spector, at (301) 415–7080, TDD: (301) 415–2100, or by e-mail at *aks@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 ((301) 415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: January 6, 2005.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 05–588 Filed 1–7–05; 9:21 am]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

Proposed Collection; Comment Request for Review of an Expiring Information Collection: RI 20–80

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget a request for review of an expiring information collection. RI 20–80, Alternative Annuity Election, is used for individuals who are eligible to elect whether to receive a reduced annuity and a lump-sum payment equal to their retirement contributions (alternative form of annuity) or an unreduced annuity and no lump sum.

Approximately 200 RI 20–80 forms are completed annually. We estimate it takes approximately 20 minutes to complete this form. The annual burden is 67 hours.

Comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of OPM, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, fax (202) 418–3251 or via e-mail to *mbtoomey@opm.gov.* Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to: Pamela S. Israel, Chief, Operations Support Group, Retirement Services Program, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3349, Washington, DC 20415.

For Information Regarding Administrative Coordination Contact: Cyrus S. Benson, Team Leader, Publications Team, Administrative Services Branch, (202) 606–0623.

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 05–455 Filed 1–10–05; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 425, OMB Control No. 3235–0521, SEC File No. 270–462.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget request for extension of the previously approved collection of information discussed below.

Securities Act Rule 425 (OMB Control No. 3235–0521; SEC File No. 270–462) requires the filing of certain prospectuses and communications under Rules 135 and 165 in connection with business combination transactions. The purpose of the rule is to relax existing restrictions on oral and written communications with shareholders about tender offers, mergers and other business combination transactions by permitting the dissemination of more information on a timely basis as long as the written communications are filed on the date of first use. The information provided under Rule 425 is made available to the public upon request. Also, the information provided under Rule 425 is mandatory. Approximately 2,000 issuers file communications under Rule 425 at an estimated .25 hours per response for a total of 500 annual burden hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission by sending an e-mail to: *David_Rostker@omb.eop.gov.*; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must

be submitted to OMB within 30 days of this notice.

Dated: January 5, 2005.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 05–463 Filed 1–10–05; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request; Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Form CB; OMB Control No. 3235–0518; SEC File No. 270–457.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget request for extension of the previously approved collection of information discussed below.

Form CB (OMB Control No. 3235–0518; SEC File No. 270–457) is a tender offer statement filed in connection with a tender offer for a foreign private issuer. This form is used to report an issuer tender offer conducted in compliance with Exchange Act Rule 13e–4(h)(8) and a third-party tender offer conducted in compliance with Exchange Act Rule 14d–1(c). It also is used by a subject company pursuant to Exchange Act Rule 14e–2(d). This information is made available to the public. Information provided on Form CB is mandatory. Approximately 200 respondents file Form CB at an estimated .5 hours per response for a total annual burden of 100 hours. It is estimated that 25% of the total burden hours (25 reporting burden hours) is prepared by the filer. The remaining 75% of the burden hours is prepared by outside counsel.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or send an e-mail to: *David_Rostker@omb.eop.gov;* and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

January 3, 2005.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–50 Filed 1–10–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26719; File No. 812–13110]

IDS Life Insurance Company, et al., Notice of Application

January 5, 2005.

AGENCY: The Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an amended order pursuant to section 11(a) of the Investment Company Act of 1940, as amended (''Act'') approving the terms of an offer of exchange.

APPLICANTS: IDS Life Insurance Company (''IDS Life''), IDS Life Variable Account 10 (''Account 10'') and IDS Life Accounts F, G, H, IZ, JZ, KZ, LZ, MZ, N, PZ, QZ, RZ, SZ and TZ (''Old Accounts'' and collectively with Account 10, ''Accounts'') (collectively, ''Applicants'').

SUMMARY OF APPLICATION: Applicants seek an order to amend an Existing Order (described below) (''Amended Order'') pursuant to section 11(a) of the Act to approve extending the terms of an existing offer of exchange of certain outstanding annuity contracts issued by IDS Life and made available through the Old Accounts (''Old Contracts'') for new American Express Retirement Advisor Advantage Plus℠ Variable Annuity contracts issued by IDS Life and made available through Account 10 (''RAVA Advantage Plus'' and collectively with the Old Contracts, ''Contracts'').

FILING DATE: The Application was filed on July 19, 2004 and amended and restated on December 20, 2004.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 31, 2005 and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, Mary Ellyn Minenko, Vice President and Group Counsel, American Express Financial Advisors Inc., 50607 AXP Financial Center, Minneapolis, MN 55474.

FOR FURTHER INFORMATION CONTACT: Mark Cowan, Senior Counsel, or Zandra Bailes, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (telephone (202) 942–8090).

Applicants' Representations

1. IDS Life is a stock life insurance company organized in 1957 under the laws of the State of Minnesota. It conducts a conventional life insurance business. IDS Life is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934, as amended, and is a member of the National Association of Securities Dealers. IDS Life is a wholly owned subsidiary of American Express Financial Corporation (''AEFC''). IDS Life is the issuer and principal underwriter of the Contracts funded through the Accounts.

2. Account 10 is a segregated asset account of IDS Life. Account 10 funds the variable benefits available under RAVA Advantage Plus. Account 10 and its component subaccounts are registered together with the Commission as a single unit investment trust under the Act (File No. 811–07355).

3. The Old Accounts are segregated asset accounts of IDS Life. The Old Accounts fund the variable benefits available under the IDS Life Variable Retirement Annuity (''VRA''), the IDS Life Combination Retirement Annuity (''CRA''), the IDS Life Flexible Annuity (''Flex'') and the IDS Life Employee Benefit Annuity (''EBA''). The Old Accounts are registered together with the Commission as a single unit

investment trust under the Act (File No. 811–3217).

4. Applicants assert that in recent years the variable annuity marketplace has become increasingly competitive. Many of the purchasers of variable annuity contracts in the 1980s and early 1990s are at, or close to, the expiration of their contingent deferred sales charge (''CDSC'') periods, and the contract values of many contracts are no longer subject to a CDSC. Holders of such contracts have become prime targets for competitors' variable annuity sales efforts. One feature offered to variable annuity purchasers is a ''bonus'' or ''credit'' funded from the insurer's general account, generally ranging from 1–4% of contract value. IDS Life has experienced the effects of these ''bonus offers'' through the loss of a portion of its Old Contracts.

5. IDS Life states that its competitors are permitted to make bonus offers to IDS Life's Old Contract owners because offers of exchange to contract owners of unaffiliated insurance companies are not prohibited by Section 11 of the Act by virtue of a no-action position granted to Alexander Hamilton Funds (pub. avail. July 20, 1994) (''Alexander Hamilton''). Applicants state that Alexander Hamilton stands for the proposition that, except for limited exceptions, exchange offers between unaffiliated investment companies are not prohibited under section 11. Consistent with section 11(a), therefore, a fund may impose a CDSC on shares purchased by investors with proceeds of shares from an unaffiliated fund.

6. Applicants assert that, but for the existence of the affiliated nature of the exchange, IDS Life would be able to offer an exchange program to its existing Old Contract owners that is similar to its competitors' programs. However, unlike its competitors who may make bonus offers to Old Contract owners, IDS Life is constrained from making a similar offer without first obtaining Commission approval of the terms of the exchange.

Existing Exchange Offer

7. Applicants state that in response to this competitive dilemma, IDS Life developed an offer of exchange. On March 12, 2002, the Commission issued an order approving the terms of the offer of exchange (''Existing Exchange Offer'') that permits eligible contract owners to exchange Old Contracts for American Express Retirement Advisor Advantage[sm] Variable Annuity (''RAVA Advantage'') contracts issued by IDS Life and made available through Account 10 (''Existing Order''). RAVA Advantage is an enhanced contract that offers a lower mortality and expense risk (''M&E'') charge than the Old Contracts, credits (''Purchase Payment Credits'') on certain payments to the contracts (initial payments and subsequent additional payments to the contracts are referred to herein individually as a ''Purchase Payment'' and collectively as ''Purchase Payments''), more subaccounts investing in corresponding funds or portfolios (collectively, ''Investment Funds'') and optional enhanced death benefits. IDS Life applies a credit to certain exchanges (''Exchange Credit'' and collectively with Purchase Payment Credits, ''Credits'') that is in addition to any Purchase Payment Credit for which the contract owner would otherwise be eligible under the RAVA Advantage contract.

8. When a contract owner exchanges into a RAVA Advantage contract, he or she can allocate the Purchase Payment to any of the Investment Funds available under RAVA Advantage. If a contract owner exercises the free look option, IDS Life reverses either the RAVA Advantage contract value (less any Credits) or the Purchase Payment made to the RAVA Advantage contract, depending on applicable law. IDS Life applies this amount to restore the Old Contract to the extent possible. IDS Life allocates this amount to the selected Old Contract investments in the proportions that existed just prior to the exchange. Any adjustments made due to investment experience are allocated or deducted according to the selected investment percentage allocations under the Old Contract just prior to the exchange. Withdrawals made after the free look period under RAVA Advantage has expired are governed by the terms of the RAVA Advantage contract, including application of the CDSC. To the extent a death benefit or surrender payment included any Credit amounts applied within twelve months preceding: (i) The date of death that results in a lump sum death benefit under RAVA Advantage; or (ii) a request for a CDSC waiver due to the owner or annuitant's confinement to a nursing home, IDS Life will recapture the Credits.

Extended Exchange Offer

9. In February 2004, IDS Life began selling RAVA Advantage Plus in approved States. RAVA Advantage Plus is an enhanced version of RAVA Advantage and is available as a nonqualified annuity for after-tax contributions only, or as a qualified annuity under certain retirement plans. RAVA Advantage Plus—Band 3 is available to current or retired employees of AEFC and their spouses (collectively, ''Employees''); current or retired financial advisors who are registered representatives of IDS Life and their spouses (collectively, ''Advisors''); or individuals who, with IDS Life's approval, invest an initial Purchase Payment of $1,000,000 or more (collectively, ''Band 3 Contracts''). RAVA Advantage Plus offers an additional death benefit, additional Purchase Payment Credits under Band 3 Contracts, different Investment Funds, guarantee period accounts (''GPAs''), an optional guaranteed minimum withdrawal benefit (''Withdrawal Benefit''), different transfer provisions and additional features such as a special dollar-cost averaging program. If an Old Contract owner exchanged into a RAVA Advantage Plus contract, he or she could allocate Purchase Payments to any of the Investment Funds available under RAVA Advantage Plus, including most of the Investment Funds available under the Old Contract, as well as Investment Funds that are not available under the Old Contract. To the extent a death benefit or surrender payment included any Credit amounts applied within twelve months preceding: (i) The date of death that results in a lump sum death benefit under RAVA Advantage Plus; (ii) a request for a CDSC waiver due to the owner or owner's spouse's confinement to a nursing home or hospital or the owner's terminal illness; or (iii) the owner's settlement under an annuity payout plan, IDS Life will recapture the Credits. If a non-natural person owns the RAVA Advantage Plus contract, the benefits and distributions under the contract are based on the life of the annuitant.

10. Applicants now seek an Amended Order to approve extending the terms of the Existing Exchange Offer to permit the exchange of the Old Contracts for new RAVA Advantage Plus contracts in those states where RAVA Advantage Plus is approved (''Extended Exchange Offer''). The terms of the Extended Exchange Offer would be substantially similar to those described in the Existing Order. Applicants state that the Extended Exchange Offer, like the Existing Exchange Offer, is designed to respond to IDS Life's competitive dilemma and to assure that persisting contract owners who accept the Extended Exchange Offer receive an immediate and enduring economic benefit.

Comparison of RAVA Advantage and RAVA Advantage Plus

11. The primary differences between RAVA Advantage and RAVA Advantage Plus are as follows:

a. Purchase Payments

Both RAVA Advantage and RAVA Advantage Plus may be issued as a non-qualified annuity for after-tax contributions only, or as a qualified annuity under the following retirement plans: (i) Individual Retirement Annuities, including Roth IRAs (collectively, ''IRAs''); (ii) SIMPLE IRAs; (iii) Simplified Employee Pension (''SEP'') plans; (iv) plans under Section 401(k) of the Internal Revenue Code of 1986, as amended (''Code'') (''section 401(k) Plans''); (v) custodial and trusteed plans under section 401(a) of the Code (''section 401(a) Plans''); or (vi) Tax-Sheltered Annuities under section 403(b) of the Code (''TSAs''). Under RAVA Advantage, the owner may allocate Purchase Payments to subaccounts or the fixed account in even 1% increments. Under RAVA Advantage Plus, if the owner has not selected the Withdrawal Benefit, the owner may allocate Purchase Payments to the subaccounts, GPAs (in approved States), the fixed account and/or the special dollar cost averaging account (when available) in even 1% increments. If the owner has selected the Withdrawal Benefit, the owner must allocate Purchase Payments in accordance with an available asset allocation program. IDS Life reserves the right to not accept Purchase Payments allocated to the fixed account for twelve months following either a partial surrender from the fixed account or a lump sum transfer from the fixed account to a subaccount.

b. Investment Funds and Other Investment Options

Owners of RAVA Advantage contracts currently may allocate their Purchase Payments among 53 Investment Funds from 17 fund families. Owners of RAVA Advantage Plus contracts currently may allocate their Purchase Payments among 56 Investment Funds from 17 fund families. RAVA Advantage also offers a fixed account investment option with a guaranteed minimum interest rate of 3% on an annual basis. RAVA Advantage Plus offers a fixed account investment option with a guaranteed minimum interest rate ranging from 1.5% to 3% on an annual basis depending on the State in which the contract is issued. In addition, RAVA Advantage Plus offers GPAs (in approved States). The owner may allocate Purchase Payments and Purchase Payment Credits to one or more of the GPAs with guarantee periods that IDS Life declares. Each GPA pays an interest rate that IDS Life declares when the owner makes an allocation to the account.

c. Optional Withdrawal Benefit

RAVA Advantage Plus contains a new optional living benefit that currently is not available under RAVA Advantage. The Withdrawal Benefit is available (in approved States) if the owner is age 75 or younger at contract issue. The Withdrawal Benefit gives the owner the right to take limited partial withdrawals in each contract year that ultimately equal Purchase Payments plus Purchase Payment Credits, as adjusted for certain excess withdrawals. The Guaranteed Benefit Payment is the amount that the owner is entitled to take through partial withdrawals each contract year. An annual Elective Step up option is available that allows the owner to step up the Guaranteed Benefit Amount to 100% of the contract anniversary value, subject to certain rules. The Withdrawal Benefit requires that the owner participate in an available asset allocation program. The current cost of the Withdrawal Benefit is 0.60%. IDS Life reserves the right to increase this cost up to a maximum of 2.50% for new RAVA Advantage Plus contract owners. However, any change to the cost will only apply to an existing RAVA Advantage Plus contract owner if: (i) He or she changes asset allocation models and the current cost for new owners is higher than the cost currently paid by the existing owner; or (ii) the existing RAVA Advantage Plus contract owner chooses the annual Elective Step up and the current cost for new owners is higher than the cost currently paid by the existing owner. IDS Life also reserves the right to charge a fee that varies by the asset allocation model selected.

d. Transfers

Under RAVA Advantage the owner may transfer contract values between the subaccounts, or from the subaccounts to the fixed account. However, certain restrictions apply with respect to the timing of transfers from the fixed account. Under RAVA Advantage Plus, if required to participate in the asset allocation program in connection with the Withdrawal Benefit, the owners may not make transfers except among the various asset allocation models then available. Otherwise, the owner may transfer contract values between the subaccounts. The owner also may transfer contract values from the subaccounts to the GPAs and the fixed account. However, certain restrictions apply with respect to the timing of transfers from the fixed account. The owner may transfer contract values from any GPA to the subaccounts, fixed account or another GPA any time after 60 days of transfer or Purchase Payment allocation into that GPA. Transfers made more than 30 days before the end of the guarantee period will receive a market value adjustment, which may result in a gain or loss of contract value.

e. Purchase Payment Credits

Under RAVA Advantage, the Purchase Payment Credits are: 1% of each Purchase Payment received if the owner selected the ten-year CDSC schedule and the initial Purchase Payment is under $100,000 or if the owner selected the seven-year CDSC schedule and the initial Purchase Payment is at least $100,000; and 2% of each Purchase Payment received if the owner selected the ten-year CDSC schedule and the initial Purchase Payment is at least $100,000.

Under RAVA Advantage Plus, the Purchase Payment Credits are: 1% of each Purchase Payment received if the owner selected the ten-year CDSC schedule and the initial Purchase Payment is under $100,000 or if the owner selected the seven-year CDSC schedule and the initial Purchase Payment is at least $100,000 but less than $1,000,000; and 2% of each Purchase Payment received if the owner selected the ten-year CDSC schedule and the initial Purchase Payment is at least $100,000 but less than $1,000,000. For Band 3 Contracts, the Purchase Payment Credits are: 2% of each Purchase Payment received if the owner selected the seven-year CDSC schedule; and 3% of each Purchase Payment received if the owner selected the ten-year CDSC schedule.

f. Recapture of Purchase Payment Credits

Under RAVA Advantage, IDS Life currently recaptures Purchase Payment Credits if the owner returns the RAVA Advantage contract during the free look period. IDS Life also may recapture Purchase Payment Credits if they were applied within twelve months preceding: the date of death that results in a lump sum death benefit; or a request for a surrender due to the owner or annuitant's confinement to a nursing home. See, *IDS Life Insurance Company, et al.,* Investment Company Act Release Nos. 24220 (December 23, 1999) (Notice) and 24257 (January 19, 2000) (Order).

Under RAVA Advantage Plus, IDS Life currently recaptures Purchase Payment Credits if the owner returns the RAVA Advantage Plus contract during the free look period. IDS Life also may recapture Purchase Payment Credits if they were applied within twelve months

preceding: the date of death that results in a lump sum death benefit; a request for a surrender due to the owner or owner's spouse's confinement to a nursing home or hospital or the owner's terminal illness; or settlement under an annuity payout plan. See, *IDS Life Insurance Company, et al.,* Investment Company Act Release Nos. 26338 (January 22, 2004) (Notice) and 26354 (February 20, 2004) (Order).

g. Surrender Options

Under RAVA Advantage, the owner can access contract values at any time through partial or full surrender and the owner has a Free Withdrawal Amount equal to earnings or up to 10% of the prior anniversary contract value per contract year (if not already included in earnings).

Under RAVA Advantage Plus, the owner can access contract values at any time through partial or full surrender. If the owner has not selected the Withdrawal Benefit, the owner has a Total Free Amount equal to earnings or up to 10% of the prior anniversary contract value per contract year (if not already included in earnings). If the owner selected the Withdrawal Benefit, the owner may withdraw up to the Guaranteed Benefit Payment each contract year. Amounts withdrawn in excess of Guaranteed Benefit Payment may reduce future amounts available under the Withdrawal Benefit.

h. All Standard and Optional Death Benefits

Under RAVA Advantage, payment to the beneficiary occurs upon the earlier of the owner or annuitant's death, and benefits are based on the age of both the owner and annuitant. Under RAVA Advantage Plus, payment to the beneficiary occurs upon the owner's death, and benefits are based on the age of the owner.

i. Standard Death Benefit

Under RAVA Advantage, if the owner and annuitant are age 80 or younger on date of death, the death benefit is the greatest of: The contract value; the contract value as of most recent sixth contract anniversary plus subsequent Purchase Payments less adjusted partial surrenders; or Purchase Payments less adjusted partial surrenders. If either the owner or annuitant is age 81 or older on the date of death, the death benefit is the greatest of: The contract value; or Purchase Payments less adjusted partial surrenders. The benefit provided under the optional Return of Purchase Payments Death Benefit (''ROPP Death Benefit'') described below is included in the RAVA Advantage standard death benefit at no extra cost.

Under RAVA Advantage Plus, if the owner is age 75 or younger at contract issue, the death benefit is the greater of: the contract value, less any Purchase Payment Credits subject to recapture and less a pro rata portion of any rider fees; or Purchase Payments less adjusted partial surrenders. If the owner is age 76 or older at contract issue, the death benefit is: The contract value, less any Purchase Payment Credits subject to recapture and less a pro rata portion of any rider fees.

j. Optional Return of Purchase Payment (''ROPP'') Death Benefit

Under RAVA Advantage Plus, the ROPP Death Benefit is available (in approved states) if the owner is age 76 or older at contract issue. The benefit provided by the ROPP Death Benefit is included in the standard death benefit if the owner is age 75 or younger at contract issue at no additional cost. The ROPP Death Benefit states that, upon the owner's death before annuity payouts begin and while the contract is in force, IDS Life will pay the designated beneficiary the greater of: The contract value, less Purchase Payment Credits subject to recapture and less a pro rata portion of any rider fees; or Purchase Payments minus adjusted partial surrenders. The current cost of the ROPP Death Benefit is 0.20%. IDS Life reserves the right to increase the cost after the tenth rider anniversary to a maximum of 0.30% and to discontinue offering the ROPP Death Benefit for new RAVA Advantage Plus contracts.

k. Optional Maximum Anniversary Value (''MAV'') Death Benefit

The optional MAV Death Benefit is available under both RAVA Advantage and RAVA Advantage Plus. Under RAVA Advantage, the MAV Death Benefit is available (in approved States) if both the owner and annuitant are age 75 or younger at contract issue. The MAV Death Benefit states that, upon the earlier of the owner or annuitant's death before annuity payouts begin and while the contract is in force, IDS Life will pay the designated beneficiary the Maximum Anniversary Value (''MAV'').

Under RAVA Advantage Plus, the MAV Death Benefit is available (in approved States) if the owner is age 75 or younger at contract issue. The MAV Death Benefit states that, upon the owner's death before annuity payouts begin and while the contract is in force, IDS Life will pay the designated beneficiary the greatest of: The contract value, less Purchase Payment Credits subject to recapture and less a pro rata portion of any rider fees; Purchase Payments minus adjusted partial surrenders; or the MAV as calculated on the most recent contract anniversary plus subsequent Purchase Payments made and minus adjustments for partial surrenders since that contract anniversary. The current cost of the MAV Death Benefit under RAVA Advantage Plus is 0.25%. IDS Life reserves the right to increase this cost after the tenth rider anniversary to a maximum of 0.35% and to discontinue offering the MAV Death Benefit for new RAVA Advantage Plus contracts. A fee discount of 0.10% applies if the owner purchases the MAV Death Benefit with either the EEB or EEP (described below).

l. Optional Maximum Five-Year Anniversary Value (''5-Year MAV'') Death Benefit

RAVA Advantage Plus contains a new optional death benefit that currently is not available under RAVA Advantage. The 5-Year MAV Death Benefit is available (in approved states) if the owner is age 75 or younger at contract issue. The 5-Year MAV Death Benefit states that, upon the owner's death before annuity payouts begin and while the contract is in force, IDS Life will pay the designated beneficiary the greatest of: The contract value, less Purchase Payment Credits subject to recapture and less a pro rata portion of any rider fees; Purchase Payments minus adjusted partial surrenders; or the MAV as calculated on the most recent fifth contract anniversary plus subsequent Purchase Payments made and minus adjustments for partial surrenders since that contract anniversary. The current cost of the 5-Year MAV Death Benefit is 0.10%. IDS Life reserves the right to increase this cost after the tenth rider anniversary to a maximum of 0.20% and to discontinue offering the 5-Year MAV Death Benefit for new RAVA Advantage Plus contracts. A fee discount of 0.05% applies if the owner purchases the 5-Year MAV Death Benefit with either the EEB or EEP (described below).

m. Optional Enhanced Earnings Death Benefit (''EEB'')

The optional EEB is available under both RAVA Advantage and RAVA Advantage Plus. Under RAVA Advantage, the EEB is available (in approved States) if both the owner and annuitant are age 75 or younger at the rider effective date. The EEB states that, upon the earlier of the owner or annuitant's death after the first contract anniversary but before annuity payouts begin and while the contract is in force, IDS Life will pay the designated

beneficiary the standard death benefit or the MAV Death Benefit, if applicable, plus: 40% of earnings at death if the owner and the annuitant were under age 70 on the rider effective date, up to a maximum of 100% of Purchase Payments not previously surrendered that are one or more years old; or 15% of earnings at death if the owner or the annuitant were age 70 to 75 on the rider effective date, up to a maximum of 37.5% of Purchase Payments not previously surrendered that are one or more years old. The cost of the EEB under RAVA Advantage is 0.30%.

Under RAVA Advantage Plus, the EEB is available (in approved States) if the owner is age 75 or younger at the rider effective date. The EEB states that, upon the owner's death after the first contract anniversary but before annuity payouts begin and while the contract is in force, IDS Life will pay the designated beneficiary the standard death benefit or the MAV Death Benefit or 5-Year MAV Death Benefit, if applicable, plus: 40% of earnings at death if the owner was under age 70 on the rider effective date, up to a maximum of 100% of Purchase Payments not previously surrendered that are one or more years old; or 15% of earnings at death if the owner was age 70 to 75 on the rider effective date, up to a maximum of 37.5% of Purchase Payments not previously surrendered that are one or more years old. The current cost of the EEB under RAVA Advantage Plus is 0.30%. IDS Life reserves the right to increase this cost after the tenth rider anniversary to a maximum of 0.40% and to discontinue offering the EEB for new RAVA Advantage Plus contracts. A fee discount of 0.10% applies if the owner purchases the MAV Death Benefit with the EEB and a fee discount of 0.05% applies if the owner purchases the 5-Year MAV Death Benefit with the EEB.

n. Optional Enhanced Earnings Plus Death Benefit (''EEP'')

The optional EEP is available under both RAVA Advantage and RAVA Advantage Plus. Under RAVA Advantage, this benefit is available (in approved states) if both the owner and annuitant are age 75 or younger at contract issue, and the contract is purchased through an exchange. The EEP states that, upon the earlier of the owner or annuitant's death, after the first contract anniversary but before annuity payouts begin and while the contract is in force, IDS Life will pay the designated beneficiary: EEP Part I benefits, which equal the benefits payable under the EEB described above; plus EEP Part II benefits, which equal a percentage of exchanged Purchase Payments identified at issue and not previously surrendered as follows:

Contract year date	Percentage if owner and annuitant are under age 70 on the rider effective date	Percentage if owner or annuitant are 70–75 on the rider effective date
One and Two	0	0
Three and Four	10	3.75
Five or more	20	7.5

The cost of the EEP under RAVA Advantage is 0.40%.

Under RAVA Advantage Plus, the EEP is available (in approved States) if the owner is age 75 or younger at contract issue. The EEP states that, upon the owner's death after the first contract anniversary but before annuity payouts begin and while the contract is in force, IDS Life will pay the designated beneficiary: EEP Part I benefits, which equal the benefits payable under the EEB described above; plus EEP Part II benefits, which equal a percentage of exchanged Purchase Payments identified at issue and not previously surrendered as follows:

Contract year	Percentage if owner is under age 70 on the rider effective date	Percentage if owner is age 70–75 on the rider effective date
One and Two	0	0
Three and Four	10	3.75
Five or more	20	7.5

The current cost of the EEP under RAVA Advantage Plus is 0.40%. IDS Life reserves the right to increase this cost after the tenth rider anniversary to a maximum of 0.50% and to discontinue offering the EEP for new RAVA Advantage Plus contracts. A fee discount of 0.10% applies if the owner purchases the MAV Death Benefit with the EEP and a fee discount of 0.05% applies if the owner purchases the 5-Year MAV Death Benefit with the EEP.

o. Annuity Payout Options

There are five annuity payout options under both RAVA Advantage and RAVA Advantage Plus: (A) Life annuity—no refund; (B) life annuity with five, ten or 15 years certain; (C) life annuity—installment refund; (D) joint and last survivor life annuity—no refund; and (E) payouts for a specified period. These five annuity payouts are available on a fixed or variable basis, or a combination of both. A sixth annuity payout option, the Remaining Benefit Amount Payout Option, is available only under the Withdrawal Benefit under RAVA Advantage Plus. This sixth annuity payout is available on a fixed basis only. IDS may also agree to other payout arrangements.

p. Asset Rebalancing

Under both RAVA Advantage and RAVA Advantage Plus, if the owner has not selected the Withdrawal Benefit, the owner can elect to have the variable subaccount portion of the contract value automatically rebalanced on either a quarterly, semi-annual or annual basis, based on the allocations chosen by the

contract owner. Under RAVA Advantage Plus, if the owner has selected the Withdrawal Benefit and therefore is required to participate in an asset allocation program, IDS rebalances contract values quarterly. There is no additional cost for asset rebalancing.

q. Other Features

Both RAVA Advantage and RAVA Advantage Plus provide for dollar-cost averaging. In addition, RAVA Advantage Plus provides for a special dollar-cost averaging program (which may not be available at all times). IDS Life reserves the right to add new contract features to RAVA Advantage and/or RAVA Advantage Plus.

r. CDSC Schedules

Under both RAVA Advantage and RAVA Advantage Plus, IDS Life assesses a CDSC against partial or full surrenders in excess of the Free Withdrawal Amount/ Total Free Amount. IDS Life applies a CDSC on each Purchase Payment. The length of time from receipt of a Purchase Payment to the time of surrender determines the percentage of CDSC. Under the seven-year CDSC period, the CDSC ranges from 7% in year 1 to 0% in year 8 and after. Under the ten-year CDSC period, the CDSC ranges from 8% in year 1 to 0% in year 11 and after. IDS Life does not assess a CDSC on contract earnings, Free Withdrawal Amounts/ Total Free Amounts, required minimum distributions (provided the amount is no greater than the required minimum distribution amount calculated under the specific contract, currently in force), amounts refunded during the free look period, death benefits, or if payments are made under any annuity payout option (unless payouts made under annuity payout option E are later surrendered). Additionally, the RAVA Advantage contract provides for a waiver of the CDSC if the owner or annuitant is confined to a nursing home, and has been for the prior 90 days, and confinement began after the contract date. RAVA Advantage Plus provides for a waiver of the CDSC if the owner or the owner's spouse is confined to a nursing home or hospital, and has been for the prior 60 days, and confinement began after the contract date. RAVA Advantage Plus also provides for a waiver of the CDSC if the owner is diagnosed in the second or later contract years as disabled with a medical condition that with reasonable medical certainty will result in death within 12 months or less from the date of a licensed physician's statement.

s. M&E Charge

During the life of the RAVA Advantage contract, IDS life deducts an M&E charge at an annual rate of 0.95% of the average daily subaccount value for nonqualified annuity contracts and 0.75% of the average daily subaccount value for qualified annuity contracts. During the life of the RAVA Advantage Plus contract, IDS life deducts an M&E charge at an annual rate of 0.95% of the average daily subaccount value for nonqualified annuity contracts, 0.75% of the average daily subaccount value for qualified annuity contracts and 0.55% of the average daily subaccount value for Band 3 Contracts.

t. Contract Administrative Charge

Under both RAVA Advantage and RAVA Advantage Plus, IDS Life deducts an annual charge of $30 for administrative expenses from the contract value of each contract. For RAVA Advantage Plus, IDS Life reserves the right to increase this annual contract administrative charge after the first contract anniversary to a maximum of $50. Under RAVA Advantage and RAVA Advantage Plus, IDS Life waives the contract administrative charge when the contract value, or total Purchase Payments less any Purchase Payments surrendered, is $50,000 or more on the current contract anniversary.

u. Premium Tax

Under both RAVA Advantage and RAVA Advantage Plus, IDS life deducts premium taxes of up to 3.5%, if applicable. These taxes depend upon the contract owner's state of residence or the State in which the contract was sold. Currently IDS Life deducts any applicable premium tax when annuity payouts begin. However, IDS Life reserves the right to deduct this tax at other times such as when a contract is surrendered.

v. Operating Expenses of the Investment Funds

Under both RAVA Advantage and RAVA Advantage Plus, assets invested in the Investment Funds are charged with the annual operating expenses of those Investment Funds.

The Old Contracts

12. VRA and CRA are registered together under the 1933 Act (File No. 2–73114). IDS Life no longer offers VRA contracts. IDS Life offers CRA contracts only for limited purposes. VRA and CRA both were issued as nonqualified annuities for after-tax contributions only, or as qualified annuities under the following retirement plans: (i) IRAs; (ii) SEP plans; (iii) Section 401(k) Plans; (iv) Section 401(a) Plans; (v) TSAs, or (vi) plans under Section 457 of the Code (''Section 457 Plans''). VRA was purchased with a single Purchase Payment between $5,000 and $500,000. No additional Purchase Payments are allowed under VRA. CRA may be purchased with a minimum initial Purchase Payment of $600, or in minimum installments of $50 per month or $23.08 biweekly under a scheduled payment plan. An owner may make additional Purchase Payments to CRA, which require a $50 minimum (unless Purchase Payments are made by installments under a scheduled payment plan), subsequent to the initial Purchase Payment. Maximum limitations on Purchase Payments are imposed for the first year and subsequent years, depending on whether the annuity is nonqualified or qualified. Participants in the CRA Select University of Wisconsin TSA Plan (''CRA Select'') bought CRA with installment payments of $200 to $25,000 annually.

13. Owners of VRA and CRA contracts currently may allocate their Purchase Payments among 14 Old Accounts that invest in 14 corresponding Investment Funds (most of which currently are available under RAVA Advantage Plus). CRA also offers a fixed account investment option with a guaranteed minimum interest rate of 3.5% to 4% on an annual basis depending on when the CRA contract was issued. VRA does not have a fixed account investment option.

14. Owners of VRA and CRA contracts may transfer contract values among the Old Accounts without charge. Transfers to and from CRA's fixed account are permitted, subject to certain restrictions described in the prospectus for the CRA contracts.

15. The owner of a VRA or CRA contract can access contract values at any time before annuity payouts begin by means of partial surrenders or a full surrender. In addition, VRA permits the owner a Free Withdrawal Amount of up to 10% of the initial Purchase Payment amount each year after the first without incurring a CDSC. CRA Select permits an annual Free Withdrawal Amount of 10% of the contract value at the beginning of each contract year. There are no other Free Withdrawal Amounts under CRA.

16. The death benefit under VRA and CRA is available at no extra cost. The death benefit provision under both VRA and CRA states that, upon the earlier of the owner or annuitant's death before annuity payouts begin and while the contract is in force, IDS Life will pay the following death benefits to the designated beneficiary: (i) If death

occurs before the annuitant's 75th birthday, the beneficiary receives the greater of the contract value; or Purchase Payments, minus any surrenders, or (ii) if death occurs on or after the annuitant's 75th birthday, the beneficiary receives the contract value.

17. The VRA and CRA contracts contain the same annuity payout options A through E as RAVA Advantage Plus. Annuity payouts are available on a fixed or variable basis, or a combination of both.

18. Under VRA, IDS Life assesses a CDSC against partial or full surrenders in excess of the Free Withdrawal Amount. The CDSC applies to surrenders in the first seven contract years as a percentage of the amount surrendered. The CDSC ranges from 7% in the first contract year to 0% after 7 contract years. Under CRA, IDS Life assesses a CDSC against partial or full surrenders (in excess of the Free Withdrawal Amount for CRA Select). The CDSC is a percentage of the amount surrendered. Three separate CDSC periods apply to the three different versions of CRA. For the original CRA, which is no longer sold, the CDSC applies to surrenders in the first eleven contract years and ranges from 7% in the first contract year to 0% after 11 contract years. For CRA Select, which funded the University of Wisconsin TSA Plan but is no longer sold, the CDSC applies to surrenders in the first eight contract years and ranges from 7% in the first contract year to 0% after 8 contract years. For the CRA version that currently is sold for conversions from American Express Retirement Services or other IDS Life retirement annuities under which conversion is available, the CDSC applies to surrenders in the first seven contract years and ranges from 6% in the first contract year to 0% after 7 contract years. IDS Life does not assess a CDSC on Free Withdrawal Amounts under any VRA or CRA Select contract, required minimum distributions (provided the amount is no greater than the required minimum distribution amount calculated under the specific contract, currently in force), amounts refunded during the free look period, death benefits, or if payments are made under any annuity payout option (unless payouts made under annuity payout option E are later surrendered).

19. During the life of each VRA and CRA contract, IDS Life deducts an M&E charge at an annual rate of 1% of the average daily variable account value.

20. IDS Life deducts a charge for administrative expenses annually from the contract value of each VRA and CRA contract. The annual contract administrative charge is $20 per contract year for VRA and $30 per contract year for CRA.

21. IDS Life deducts premium taxes of up to 3.5%, if applicable, and under the same terms as RAVA Advantage Plus.

22. Assets invested in the Investment Funds are charged with the annual operating expenses of those Investment Funds.

23. Flex is registered under the 1933 Act (File No. 33–4173). IDS Life no longer offers Flex contracts. Flex was issued as a nonqualified annuity for after-tax contributions only, or as a qualified annuity under the following retirement plans: (i) IRAs; (ii) SEP plans; (iii) Section 401(k) Plans; (iv) Section 401(a) Plans; (v) TSAs; or (vi) Section 457 Plans. Flex was purchased with a minimum initial Purchase Payment of $1,000 for qualified annuities or $2,000 for nonqualified annuities, or in minimum installments of $50 per month or $23.08 biweekly under a scheduled payment plan. An owner may make additional Purchase Payments, which require a $50 minimum (unless Purchase Payments are made by installments under a scheduled payment plan), subsequent to the initial Purchase Payment. Maximum limitations on Purchase Payments are imposed for the first year, depending on the age of the owner or annuitant, and for each subsequent year.

24. Owners of Flex contracts currently may allocate their Purchase Payments among the 14 Old Accounts that invest in 14 corresponding Investment Funds (most of which currently are available under RAVA Advantage Plus). Flex also offers a fixed account investment option with guaranteed minimum interest rates ranging from 3% to 4% on an annual basis, depending on when the Flex contract was issued.

25. Owners of Flex contracts may transfer contract values among the Old Accounts without charge. Transfers to and from the fixed account are permitted, subject to certain restrictions described in the prospectus for the Flex contracts.

26. The owner of a Flex contract can access contract values at any time before annuity payouts begin by means of partial surrenders or a full surrender. In addition, Flex permits the owner a Free Withdrawal Amount of contract earnings without incurring a CDSC.

27. The death benefit under Flex is available at no extra cost. The death benefit provision states that, upon the earlier of the owner or annuitant's death before annuity payouts begin and while the contract is in force, IDS Life will pay the following death benefits to the designated beneficiary: (i) If death occurs before the annuitant's 75th birthday, the beneficiary receives the greatest of the contract value; the contract value as of the most recent sixth contract anniversary, minus any surrenders since that anniversary; or Purchase Payments, minus any surrenders; or (ii) if death occurs on or after the annuitant's 75th birthday, the beneficiary receives the greater of the contract value; or the contract value as of the most recent sixth contract anniversary, minus any surrenders since that anniversary.

28. Flex contains the same annuity payout options A through E as RAVA Advantage Plus. Annuity payouts are available on a fixed or variable basis, or a combination of both.

29. Under Flex, IDS Life assesses a CDSC against partial or full surrenders in excess of the Free Withdrawal Amount. IDS Life applies a CDSC of 7% on each Purchase Payment if the contract owner requests a surrender within six years of making that Purchase Payment. The Flex contract provides for a waiver of the CDSC for amounts surrendered after the later of the annuitant's attaining age 65 or the tenth contract anniversary. Additionally, IDS Life does not assess a CDSC on contract earnings, required minimum distributions (provided the amount is no greater than the required minimum distribution amount calculated under the specific contract, currently in force), death benefits, or if payments are made under any annuity payout option (unless payouts made under annuity payout option E are later surrendered).

30. During the life of the Flex contract, IDS Life deducts an M&E charge at an annual rate of 1% of the average daily variable account value.

31. IDS Life deducts a charge of $6 for administrative expenses at the end of each contract quarter from the contract value of the Flex contract (which equals an annual charge of $24 per contract year).

32. IDS Life deducts premium taxes of up to 3.5%, if applicable, and under the same terms as RAVA Advantage Plus.

33. Assets invested in the Investment Funds are charged with the annual operating expenses of those Investment Funds.

34. EBA is registered under the 1933 Act (File No. 33–52518). IDS Life no longer offers EBA contracts. EBA was issued only as a group TSA. EBA was purchased with a minimum initial Purchase Payment of $1,000 or in minimum installments of $25 per month or $300 annually under a scheduled payment plan. An owner may make additional Purchase Payments, which require a $50 minimum (unless

Purchase Payments are made by installments under a scheduled payment plan), subsequent to the initial Purchase Payment. Maximum limitations on Purchase Payments are imposed for the first year, depending on the age of the contract owner, and for each subsequent year.

35. Owners of EBA contracts currently may allocate their Purchase Payments among the 14 Old Accounts that invest in 14 corresponding Investment Funds (most of which currently are available under RAVA Advantage Plus). EBA also offers a fixed account investment option with a guaranteed minimum interest rate of 4% on an annual basis.

36. Owners of EBA contracts may transfer contract values among the Old Accounts without charge. Transfers to and from the fixed account are permitted, subject to certain restrictions described in the prospectus for the EBA contracts.

37. Subject to certain restrictions imposed by the Code, the owner of an EBA contract can access certificate values at any time before annuity payouts begin by means of partial surrenders or a full surrender.

38. The death benefit under EBA is available at no extra cost. The death benefit provision states that, upon the owner/annuitant's death before annuity payouts begin and while the contract is in force, IDS Life will pay the following death benefits to the designated beneficiary: (i) If death occurs before the annuitant's 75th birthday, the beneficiary receives the greater of the certificate value; or Purchase Payments, minus any surrenders; or (ii) if death occurs on or after the annuitant's 75th birthday, the beneficiary receives the certificate value.

39. EBA contains the same annuity payout options A through E as RAVA Advantage Plus. Annuity payouts are available on a fixed or variable basis, or a combination of both.

40. Under EBA, IDS Life assesses a CDSC against partial or full surrenders in the first eleven certificate years as a percentage of the amount surrendered. The CDSC ranges from 8% in the first certificate year to 0% after 11 certificate years. The EBA contract provides for a waiver of the CDSC for amounts surrendered due to the owner's retirement under the TSA plan on or after age 55. Additionally, IDS Life does not assess a CDSC on required minimum distributions (provided the amount is no greater than the required minimum distribution amount calculated under the specific contract, currently in force), amounts refunded during the free look period, death benefits, or if payments are made under any annuity payout option (unless payouts made under annuity payout option E are later surrendered).

41. During the life of the EBA contract, IDS Life deducts an M&E charge at an annual rate of 1% of the average daily variable account value.

42. IDS Life deducts a $30 charge for administrative expenses at the end of each certificate year from the certificate value of the EBA contract.

43. IDS Life deducts premium taxes of up to 3.5%, if applicable, and under the same terms as RAVA Advantage Plus.

44. Assets invested in the Investment Funds are charged with the annual operating expenses of those Investment Funds.

45. Applicants represent that the features and benefits of RAVA Advantage Plus will be no less favorable than those under the Old Contracts, with some exceptions for differences in the guaranteed minimum interest rate under the fixed account investment option, lower annuity settlement rates, some additional transfer restrictions and lower initial death benefits. Applicants also represent that, with some exceptions for the CDSC, the charge for administrative expenses and optional charges for optional death benefits, the fees and charges of the RAVA Advantage Plus contract will be no higher than those of the Old Contracts.

Terms of the Extended Exchange Offer

46. Applicants propose to offer eligible owners of Old Contracts the opportunity to exchange their Old Contracts for RAVA Advantage Plus by means of the Extended Exchange Offer. Partial exchanges will not be permitted.

47. To be eligible for the Extended Exchange Offer, an Old Contract owner must meet all of the following criteria: (i) Have completed ten or more contract or certificate years under the Old Contract; (ii) have not made Purchase Payments greater than $4,000 in any tax year under the Old Contract in the 36 months prior to accepting the Extended Exchange Offer (except for installment payments made under a scheduled payment plan); and (iii) have a remaining CDSC of 2% or less of the contract or certificate value of the Old Contract. IDS Life reserves the right to expand the Extended Exchange Offer to owners of contracts who have completed less than ten contract or certificate years under the Old Contract or who have made Purchase Payments greater than $4,000 in any tax year under the Old Contract in the 36 months prior to accepting the Extended Exchange Offer. IDS Life also reserves the right to require a minimum contract or certificate value (''Exchange Value'') plus any additional transfers or rollovers for qualified annuities or any additional Purchase Payments or exchanges for nonqualified annuities (individually and collectively, the ''Additional Amounts'') for eligibility for the Extended Exchange Offer and to change those minimum amounts from time to time.

48. If an owner accepts the Extended Exchange Offer, IDS Life will allocate to the owner's account either a Purchase Payment Credit or an Exchange Credit. Under RAVA Advantage Plus, each time IDS Life receives a Purchase Payment from an owner, it allocates to the owner's account a Purchase Payment Credit equal to 1% of each Purchase Payment received: (i) If the owner selected the ten-year CDSC schedule and the initial Purchase Payment is under $100,000; or (ii) if the owner selected the seven-year CDSC schedule and the initial Purchase Payment is at least $100,000 but less than $1,000,000. Each time IDS Life receives a Purchase Payment from the owner, it allocates to the owner's account a Purchase Payment Credit equal to 2% of each Purchase Payment received if the owner selected the ten-year CDSC schedule and the initial Purchase Payment is at least $100,000 but less than $1,000,000. Under the Band 3 Contracts, each time IDS Life receives a Purchase Payment from the owner, it allocates to the owner's account a Purchase Payment Credit equal to 2% of each Purchase Payment received if the owner selected the seven-year CDSC schedule and 3% of each Purchase Payment received if the owner selected the ten-year CDSC schedule. To increase the likelihood of remaining eligible to receive the applicable Purchase Payment Credit based on the initial Purchase Payment amount, the Old Contract owner could transfer that contract or certificate value allocated to the Old Accounts to the Old Account investing in the AXP® VP Cash Management Fund while the exchange is pending to help reduce the risk of market volatility.

49. Under the terms of the RAVA Advantage Plus contract, if the initial Purchase Payment is less than $100,000, IDS Life will not allocate a 1% Purchase Payment Credit based on the initial Purchase Payment amount. However, in those cases where the initial Purchase Payment is less than $100,000, IDS Life will provide, from its general account assets, a 1% Exchange Credit based on the Exchange Value of the Old Contract applied to RAVA Advantage Plus on the day the exchange is effected (''Exchange Date''). This 1% Exchange Credit will not apply to subsequent Purchase Payments to RAVA Advantage Plus.

However, even when the initial Purchase Payment is less than $100,000, IDS Life will allocate a Purchase Payment Credit of 1% of the initial Purchase Payment and 1% of each subsequent Purchase Payment received if the owner selects the ten-year CDSC period.

50. Upon the owner's acceptance of the Extended Exchange Offer, IDS Life will issue a RAVA Advantage Plus contract with all applicable Credits. No CDSC will be deducted upon the surrender of an Old Contract in connection with the exchange. The Exchange Value of each Old Contract, together with any applicable Additional Amounts and Credits, will be applied to the new RAVA Advantage Plus contract as of the Exchange Date. The Exchange Date will be the contract date of the new RAVA Advantage Plus contract for purposes of determining contract years and anniversaries after the Exchange Date.

51. If the owner of the new RAVA Advantage Plus contract exercises the free look option, IDS Life will recapture any Credits. IDS Life will reverse either the RAVA Advantage Plus contract value (less any Credits and reflecting any applicable market value adjustment) or the Purchase Payment made to the RAVA Advantage Plus contract, depending on applicable law. IDS Life will apply this amount to restore the Old Contract to the extent possible. IDS Life will allocate this amount to the selected Old Contract investments in the proportions that existed just prior to the exchange. Any adjustments made due to investment experience and/or market value adjustment will be allocated or deducted according to the selected investment percentage allocations under the Old Contract just prior to the exchange. Withdrawals made after the free look period under RAVA Advantage Plus has expired will be governed by the terms of the RAVA Advantage Plus contract, including the application of the CDSC. To the extent a death benefit or surrender payment includes any Credit amounts applied within twelve months preceding: (i) The date of death that results in a lump sum death benefit under RAVA Advantage Plus; (ii) a request for a CDSC waiver due to the owner or owner's spouse's confinement to a nursing home or hospital or the owner's terminal illness; or (iii) the owner's settlement under an annuity payout plan, IDS Life will recapture the Credits.

52. IDS Life will notify all owners of the Old Contracts of the Extended Exchange Offer through normal client communications such as updated prospectuses or prospectus supplements (''Program Announcement''). This Program Announcement will: (i) Describe the terms and conditions of the Extended Exchange Offer; (ii) suggest to owners who may qualify that they contact their registered representatives to learn more about the Extended Exchange Offer and to discuss their individual situations (including tax, financial planning and contract considerations); and (iii) notify owners that IDS Life reserves the right to cancel the Extended Exchange Offer at any time. In addition, IDS Life may send the information in the Program Announcement to some or all Old Contract owners via additional communications that also may include that owner's specific contract information (such as Exchange Value and applicable CDSC).

53. IDS Life, either directly or through its registered representatives, will provide eligible Old Contract owners who are interested in learning more about the Extended Exchange Offer with an Offering Communication that includes information outlined in the Program Announcement and additional information describing the Extended Exchange Offer. The Offering Communication will state, in clear and plain English, that the Extended Exchange Offer is not designed for a contract owner who: (i) Intends to hold the RAVA Advantage Plus contract as a short-term investment vehicle; or (ii) anticipates surrendering all or part (*i.e.* more than the Total Free Amount on an annual basis) of his or her RAVA Advantage Plus contract before five to seven years (if the Old Contract owner would select the seven-year CDSC period under RAVA Advantage Plus) or eight to ten years (if the Old Contract owner would select the ten-year CDSC period under RAVA Advantage Plus). IDS Life will encourage Old Contract owners to carefully evaluate their personal financial planning situation when deciding whether to accept or reject the Extended Exchange Offer.

54. In addition, the Offering Communication will explain how the owner of an Old Contract contemplating an exchange may avoid the applicable CDSC on the RAVA Advantage Plus contract by not surrendering more than the annual Total Free Amount and by holding any subsequent Purchase Payments until expiration of the CDSC period. In this regard, IDS Life will state, in clear and plain English, that if the owner surrenders the RAVA Advantage Plus contract during the initial CDSC period: (i) The lower M&E charges and any applicable Credits may be more than offset by the CDSC; and (ii) an Old Contract owner may be worse off than if he or she had rejected the Extended Exchange Offer.

55. Furthermore, IDS Life will state, in clear and plain English, that guaranteed annuity settlement rates generally are lower under RAVA Advantage Plus. Therefore, if the Old Contract owner contemplates annuitizing the RAVA Advantage Plus contract during the first few years, the lower settlement factors may more than offset the lower M&E charges and any applicable Credits.

56. IDS Life will explain that if an owner accepts the Extended Exchange Offer, IDS Life will allocate to the owner's account either a Purchase Payment Credit or an Exchange Credit. If the initial Purchase Payment is at least $100,000, IDS Life will allocate to the owner's account a Purchase Payment Credit on the initial Purchase Payment and on each subsequent Purchase Payment received. To increase the likelihood of remaining eligible to receive the applicable Purchase Payment Credit based on the initial Purchase Payment amount, the Old Contract owner could transfer that contract or certificate value allocated to the Old Accounts to the Old Account investing in the AXP® VP Cash Management Fund while the exchange is pending to help reduce the risk of market volatility. If the initial Purchase Payment to RAVA Advantage Plus is less than $100,000, IDS Life will provide a 1% Exchange Credit based on the Exchange Value of the Old Contract applied to RAVA Advantage Plus on the Exchange Date. The 1% Exchange Credit will not apply to subsequent Purchase Payments. However, even when the initial Purchase Payment is less than $100,000, IDS Life will allocate a Purchase Payment Credit of 1% of the initial Purchase Payment and 1% of each subsequent Purchase Payment received if the owner selects the ten-year CDSC period.

57. In addition, IDS Life will prominently disclose that the guaranteed minimum interest rate on RAVA Advantage Plus' fixed account investment option may be less than the guaranteed minimum interest rate on the Old Contract's fixed account investment option. IDS Life also will disclose that the current death benefit on the Old Contract may be greater than the initial death benefit on RAVA Advantage Plus. When applicable, IDS Life also will explain that an owner of an Old Contract may lose some tax benefits. The Offering Communication will state that certain Investment Funds available under the Old Contracts are not available under RAVA Advantage Plus and that transfers to and from the

fixed account are more restricted under RAVA Advantage Plus than under the Old Contract. Finally, the Offering Communication will state that IDS Life may terminate the Extended Exchange Offer at any time. The Offering Communication also will include a prospectus for the new RAVA Advantage Plus contract.

58. To accept the Extended Exchange Offer, the owner of an Old Contract must complete an internal exchange form and application for the RAVA Advantage Plus contract. Applicants state that those Old Contract owners who accept the Extended Exchange Offer will incur no current taxes and that the exchanges will constitute tax-free transfers, rollovers or exchanges pursuant to Section 1035 of the Code.

59. Applicants submit that the Extended Exchange Offer is meant to encourage existing Old Contract owners to remain with IDS Life rather than surrender their contracts in exchange for a competitor's product. If the CDSC under RAVA Advantage Plus did not apply to the Exchange Value, Applicants assert that IDS Life would have no assurance that an Old Contract owner who accepted the Extended Exchange Offer would persist long enough for any applicable Credits, payments to registered representatives and other relevant expenses to be recouped through standard fees from the ongoing operation of the RAVA Advantage Plus contract.

60. Applicants state that the commissions that IDS Life will pay its registered representatives for soliciting exchanges under the Extended Exchange Offer are less than the normal commissions paid for soliciting sales of RAVA Advantage Plus contracts. Applicants assert that compensating IDS Life's registered representatives for these exchanges is necessary in order to provide sufficient incentive for them to compete with competitors' registered representatives.

61. IDS Life reserves the right to terminate the Extended Exchange Offer at any time. If IDS Life terminates the Extended Exchange Offer, it will send a notice to currently eligible Old Contract owners (''Termination Notice''). The Termination Notice will state that Old Contract owners who wish to participate in the Extended Exchange Offer must do so within two months from the date of the Termination Notice. The Termination Notice will contain all of the caveats described herein.

Applicants' Conditions

Applicants agree to the following conditions:

1. The Offering Communication and Termination Notice will contain concise, plain English statements that: (i) The Extended Exchange Offer is suitable only for an Old Contract owner who expects to hold RAVA Advantage Plus as a long-term investment; (ii) if the RAVA Advantage Plus contract is partially or completely surrendered during the initial CDSC period or annuitized during the first few years, the lower M&E charges and any applicable Credits may be more than offset by the CDSC or lower annuity settlement rates and an Old Contract owner may be worse off than if he or she had rejected the Extended Exchange Offer; (iii) IDS Life will allocate an Exchange Credit equal to 1% of the Exchange Value of the Old Contract when the initial Purchase Payment to the RAVA Advantage Plus contract is less than $100,000 (this Exchange Credit will not apply to subsequent Purchase Payments received); (iv) the guaranteed interest rate on RAVA Advantage Plus' fixed account option may be less than the guaranteed interest rate on the Old Contract's fixed account option; (v) the current death benefit on the Old Contract may be greater than the initial death benefit on RAVA Advantage Plus; (vi) certain Investment Funds available under the Old Contract are not available under RAVA Advantage Plus; (vii) transfers to and from the fixed account are more restricted under RAVA Advantage Plus than under the Old Contract; (viii) an Old Contract owner may lose some tax benefits (when applicable); and (ix) IDS Life reserves the right to terminate the Extended Exchange Offer.

2. The Offering Communication will disclose in concise, plain English each aspect of the RAVA Advantage Plus contract that could be less favorable than the Old Contracts.

3. IDS Life, either directly or through its registered representatives, will send an Offering Communication to eligible Old Contract owners who are interested in learning more about the Extended Exchange Offer. An Old Contract owner choosing to exchange will then complete and sign an internal exchange form and RAVA Advantage Plus application and return it to IDS Life. This internal exchange form will prominently restate in concise, plain English the caveats described above in Condition (1). If the internal exchange form is more than two pages long, IDS Life will use a separate document to obtain contract owner acknowledgment of the caveats described in Condition (1).

4. IDS Life will maintain the following separately identifiable records in an easily accessible place for the time periods specified below in this Condition (4) for review by the Commission upon request: (i) Records showing the level of exchange activity and how it relates to the total number of Old Contract owners eligible to exchange (quarterly as a percentage of the number eligible); (ii) copies of any form of Program Announcements, Offering Communications, Termination Notices and other written materials or scripts for presentations by registered representatives regarding the Extended Exchange Offer that IDS Life either prepares or approves, including the dates that such materials were used; (iii) records containing information about each exchange transaction that occurs, including the name of the contract owner, Old Contract and RAVA Advantage Plus contract numbers; the amount of CDSC waived on surrender of the Old Contract; Purchase Payment Credits and Exchange Credits paid; the name and CRD number of the registered representative soliciting the exchange, firm affiliation, branch office address, telephone number and the name of the registered representative's broker-dealer; commission paid; the internal exchange form (and separate document, if any, used to obtain the Old Contract owner's acknowledgment of the caveats required in Condition (1)) showing the name, date of birth, address and telephone number of the contract owner and the date the internal exchange form (or separate document) was signed; amount of contract or certificate value exchanged; and persistency information relating to the RAVA Advantage Plus contract, including the date of any subsequent surrender and the amount of CDSC paid on the surrender; and (iv) logs showing a record of any contract owner complaint about the exchange, state insurance department inquiries about the exchange, or litigation, arbitration, or other proceeding regarding any exchange. The logs will include the date of the complaint or commencement of the proceeding, name and address of the person making the complaint or commencing the proceeding, nature of the complaint or proceeding, and the persons named or involved in the complaint or proceeding. Applicants will retain records specified in (i) and (iv) for a period of six years after the date the records are created, records specified in (ii) for a period of six years after the date of last use, and records specified in (iii) for a period of two years after the date that the initial CDSC period of the RAVA Advantage Plus contract ends.

Applicants' Legal Analysis

1. Section 11(a) of the Act makes it unlawful for any registered open-end company, or any principal underwriter for such a company, to make or cause to be made an offer to the holder of a security of such company, or of any other open-end investment company, to exchange his or her security for a security in the same or another such company on any basis other than the relative net asset values of the respective securities, unless the terms of the offer have first been submitted to and approved by the Commission or are in accordance with Commission rules adopted under section 11.

2. Section 11(c) of the Act, in pertinent part, requires, in effect, that any offer of exchange of the securities of a registered unit investment trust for the securities of any other investment company be approved by the Commission or satisfy applicable rules adopted under Section 11, regardless of the basis of the exchange.

3. The purpose of section 11 of the Act is to prevent ''switching,'' the practice of inducing security holders of one investment company to exchange their securities for those of a different investment company solely for the purpose of exacting additional selling charges. That type of practice was found by Congress to be widespread in the 1930s prior to the adoption of the Act.

4. Section 11(c) of the Act requires Commission approval (by order or by rule) of any exchange, regardless of its basis, involving securities issued by a unit investment trust, because investors in unit investment trusts were found by Congress to be particularly vulnerable to switching operations.

5. Applicants assert that the potential for harm to investors perceived in switching was its use to extract additional sales charges from those investors. Applicants further assert that the terms of the proposed Extended Exchange Offer do not present the abuses against which section 11 was intended to protect. The Extended Exchange Offer is designed to allow IDS Life to compete on a level playing field with its competitors who are making bonus offers to its current Old Contract owners. No additional sales load or other fee will be imposed at the time of exercise of the Extended Exchange Offer.

6. Rule 11a–2, by its express terms, provides Commission approval of certain types of offers of exchange of one variable annuity contract for another. Applicants assert that other than the relative net asset value requirement (which is not satisfied because exchanging Old Contract owners will be given Purchase Payment Credits and/or Exchange Credits), the only part of Rule 11a–2 that would not be satisfied by the proposed Extended Exchange Offer is the requirement that payments under the Old Contract be treated as if they had been made under the new RAVA Advantage Plus contract on the dates actually made. This provision of Rule 11a–2 is often referred to as a ''tacking'' requirement because it has the effect of ''tacking together'' the CDSC expiration periods of the exchanged and acquired contracts.

7. Applicants assert that the absence of tacking does not mean that an exchange offer cannot be attractive and beneficial to investors. Applicants state that the proposed Extended Exchange Offer would assure an immediate and enduring economic benefit to investors for the following reasons: (i) RAVA Advantage Plus has a lower M&E charge than the Old Contracts. During the life of the Old Contracts, IDS Life deducts an M&E charge at an annual rate of 1% of the average daily variable account value. During the life of a RAVA Advantage Plus contract, IDS Life deducts an M&E charge at an annual rate of 0.95% of the average daily subaccount value for nonqualified annuities, 0.75% of the average daily subaccount value for qualified annuities and 0.55% of the average daily subaccount value for Band 3 Contracts; (ii) RAVA Advantage Plus contract owners receive applicable Purchase Payment Credits and/or Exchange Credits. Each time IDS Life receives a Purchase Payment from an owner, it allocates to the owner's RAVA Advantage Plus account a Purchase Payment Credit equal to: (a) 1% of each Purchase Payment received if the owner selected the ten-year CDSC period, or if the owner selected the seven-year CDSC period and the initial Purchase Payment is at least $100,000 but less than $1,000,000; (b) 2% of each Purchase Payment received if the owner selected the ten-year CDSC period and the initial Purchase Payment is at least $100,000 but less than $1,000,000; or (c) for Band 3 Contracts, 2% of each Purchase Payment received if the owner selected the seven-year CDSC period and 3% of each Purchase Payment received if the owner selected the ten-year CDSC period. If the initial Purchase Payment to RAVA Advantage Plus is less than $100,000, IDS Life will provide a 1% Exchange Credit based on the Exchange Value of the Old Contract applied to RAVA Advantage Plus on the Exchange Date (but the 1% Exchange Credit will not apply to subsequent Purchase Payments); (iii) RAVA Advantage Plus has more Investment Funds. RAVA Advantage Plus offers 56 Investment Funds in contrast to the 14 Investment Funds under the Old Contracts. One small cap Investment Fund available under the Old Contracts currently is not available under RAVA Advantage Plus. However, RAVA Advantage Plus currently includes six small cap Investment Funds to which a contract owner can allocate Purchase Payments. Therefore, RAVA Advantage Plus contract owners can allocate Purchase Payments not only to most of the Investment Funds under the Old Contracts, but also to many additional Investment Funds. This gives RAVA Advantage Plus contract owners the opportunity for greater diversification and asset allocation; (iv) RAVA Advantage Plus offers an optional living benefit. RAVA Advantage Plus contract owners may select the Withdrawal Benefit for an additional cost. The Withdrawal Benefit gives the owner the right to take limited partial withdrawals in each contract year that ultimately equal Purchase Payments plus Credits, as adjusted for certain excess withdrawals; and (v) RAVA Advantage Plus has optional enhanced death benefits. RAVA Advantage Plus contract owners may elect optional death benefits for an additional cost that provide substantive value to beneficiaries. A contract owner who expects to hold RAVA Advantage Plus as a long-term investment will receive the economic benefits of the Extended Exchange Offer. No sales charge will ever be paid on the amounts exchanged unless the RAVA Advantage Plus contract is surrendered before expiration of the CDSC period the owner has selected.

8. Applicants assert that tacking should be viewed as a useful way to avoid the need to scrutinize the terms of an offer of exchange to make sure that there is no abuse. Tacking is not a requirement of section 11. Rather, it is a creation of a rule designed to approve the terms of offers of exchange ''sight unseen.'' Tacking focuses on the closest thing to multiple deduction of sales loads that is possible in a CDSC context—multiple exposure to sales loads upon surrender or redemption. If tacking and other safeguards of Rule 11a–2 are present, there is no need for the Commission or its staff to evaluate the terms of the offer. The absence of tacking in this fully scrutinized section 11 application will have no impact on offers made pursuant to the rule on a ''sight unseen'' basis.

9. Applicants assert that the terms of IDS Life's Extended Exchange Offer are

better than those of its competitors. Unlike the Extended Exchange Offer proposed by IDS Life, when Old Contract owners exchange into competitors' contracts, they must pay any remaining CDSC on the Old Contracts at the time of the exchange. No tacking is required when IDS Life's competitors offer their variable annuity contracts to owners of Old Contracts or when IDS Life makes such an offer to competitors' contract owners. The Commission has previously approved similar exchange offers to permit the owners of older contracts to exchange them for contracts offering an immediate and enduring economic benefit even where tacking did not occur.

10. To the extent there are differences between the Old Contracts and the RAVA Advantage Plus contract, those differences relate to enhanced contractual features and charges that are fully described in the prospectus for the RAVA Advantage Plus contract. Furthermore, the Offering Communication (and any Termination Notice) will contain concise, plain English disclosure of each aspect of the RAVA Advantage Plus contract that could be less favorable than the Old Contracts.

Conclusion

Applicants submit, for the reasons stated herein, that the Extended Exchange Offer is consistent with the protections provided by section 11 of the Act, and that approving the terms of the Extended Exchange Offer is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants submit that the requested Amended Order approving the terms of the proposed Extended Exchange Offer therefore should be granted.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–42 Filed 1–10–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27935]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act''); National Fuel Gas Company (70–10273)

January 5, 2005.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 31, 2005, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After January 31, 2005, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Notice of Proposal To Amend Restated Certificate of Incorporation; Order Authorizing the Solicitation of Proxies

National Fuel Gas Company (''National Fuel Gas''), 6363 Main Street, Williamsville, NY 14221, a registered holding company, has filed with the Commission a declaration (''Declaration'') under sections 6(a)(2), 7 and 12(e) of the Act and rules 54, 62(d) and 65 under the Act.

I. Description of National Fuel Gas

National Fuel Gas, a New Jersey corporation, through its direct and indirect subsidiaries is engaged in the exploration, production, purchasing, gathering, processing, transportation, storage, retail distribution, and wholesale and retail marketing of natural gas. It owns all of the issued and outstanding common stock of National Fuel Gas Distribution Corporation, a gas-utility company that distributes natural gas at retail to approximately 732,000 residential, commercial and industrial customers (including transportation-only customers) in portions of western New York and northwestern Pennsylvania. National Fuel Gas' principal non-utility subsidiaries include National Fuel Gas Supply Corporation, Empire State Pipeline, Seneca Resources Corporation, National Fuel Resources, Inc., Highland Forest Resources, Inc., Horizon Energy Development, Inc., and Horizon LFG, Inc. (formerly Upstate Energy Inc.).

For the twelve months that ended September 30, 2004, National Fuel Gas reported operating revenues of approximately $2.0 billion, of which $1.1 billion (56%) were attributable to regulated utility gas sales. As of September 30, 2004, National and its subsidiaries owned total assets worth approximately $3.7 billion, including approximately $3.0 billion in net property, plant and equipment.

II. Requests for Authority

National Fuel Gas requests authority to amend its Restated Certificate of Incorporation (''Certificate of Incorporation''), as described below, and to solicit proxies from its shareholders in connection with the proposed amendment. The annual meeting of National Fuel Gas shareholders (''Annual Meeting'') is scheduled for February 17, 2005. To change the Certificate of Incorporation, the proposed amendment must be approved by the affirmative vote of a majority of the votes cast by the holders of the outstanding shares of Common Stock entitled to vote at the Annual Meeting. Proxies may be solicited on behalf of the directors personally, and by mail, telephone, telecopy, and employees of National Fuel Gas and its subsidiaries (with no special compensation to these employees). In addition, National Fuel Gas has retained Morrow & Co., Inc., to assist in the solicitation of proxies.

The board of directors of National Fuel Gas proposes to amend Article EIGHTH of the Certificate of Incorporation to revise the provisions relating to shareholder votes on certain actions. National Fuel Gas states that, under the New Jersey Business Corporation Act (''BCA''), certain exceptions are available to the general rule that shareholder approval is required for certain actions (collectively, ''Actions''): (1) Amendments to the Certificate of Incorporation; (2) plans of merger or consolidation; (3) sales, leases, exchanges or other dispositions

of all, or substantially all, of the assets of National Fuel Gas, otherwise than in the usual and regular course of business; and (4) dissolution of National Fuel Gas. Currently, the Certificate of Incorporation does not provide for those exceptions and therefore the approval of National Fuel Gas shareholders is required for Actions even where approval would not be required under the BCA. As discussed below, the proposed amendment would make all of the exceptions allowed under the BCA applicable to National Fuel Gas.

Currently, Article EIGHTH of the Certificate of Incorporation requires shareholder approval for ''amendments to the Certificate of Incorporation, including restatements, where shareholder approval is required or requested.'' The BCA generally requires shareholder approval of amendments to a company's certificate of incorporation, but provides that such shareholder approval is not required for certain types of non-critical amendments, including (but not limited to) amendments which would change a company's registered office or registered agent and amendments which would change a company's authorized shares in connection with transactions such as share dividends, divisions (*i.e.*, stock splits) or combinations (*i.e.*, reverse stock splits). The proposed amendment would delete from Article EIGHTH the term ''or requested.'' National Fuel Gas states that it is not clear whether the term refers to requests made by the board of directors, management, or shareholders, and that no procedures are specified in the Certificate of Incorporation regarding the form or timing of requests.

Currently, Article EIGHTH of the Certificate of Incorporation provides that ''a plan of merger or consolidation'' approved by the Board of Directors must be approved by shareholders. National Fuel Gas states that the BCA is narrower, requiring shareholder approval of: (1) Consolidations in which two or more companies consolidate to form a new company; and (2) mergers that change the rights of shareholders or materially affect shareholder voting power. The company states that the BCA permits certain other merger transactions to proceed without the approval of shareholders of the surviving corporation. Specifically, National Fuel Gas states that the BCA provides that the approval of the shareholders of the surviving corporation in a merger is not required to authorize the merger (unless the corporation's certificate of incorporation otherwise provides) if the following four conditions are met: (1) The plan of merger does not make an amendment of the certificate of incorporation of the surviving corporation which is required by the provisions of the BCA to be approved by the shareholders; (2) each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and rights, immediately after; (3) the number of voting shares outstanding immediately after merger, plus the number of voting shares issuable on conversion of other securities or on exercise of rights and warrants issued pursuant to the merger, will not exceed by more than 40% the total number of voting shares of the surviving corporation outstanding immediately before the merger; and (4) the number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable on conversion of other securities or on exercise of rights and warrants issued pursuant to the merger, will not exceed by more than 40% the total number of participating shares of the surviving corporation outstanding immediately before merger. The proposed amendment to Article EIGHTH of the Certificate of Incorporation would make these statutory exceptions applicable to National Fuel Gas.

Currently, under Article EIGHTH of the Certificate of Incorporation, National Fuel Gas shareholders must approve ''a sale, lease, exchange or other disposition of all, or substantially all, the assets of the corporation otherwise than in the usual and regular course of business.'' The BCA provides that a parent corporation may transfer, without shareholder approval, any or all of its assets to any corporation all of the outstanding shares of which are owned, directly or indirectly, by the parent corporation, unless the parent corporation's certificate of incorporation otherwise requires. The proposed amendment would permit National Fuel Gas to transfer all or substantially all of its assets to any wholly owned subsidiary without shareholder approval;[1] shareholders would continue to have the right to vote on the sale of substantially all of National Fuel Gas' assets to a third party.

Currently, under Article EIGHTH of the Certificate of Incorporation shareholder approval is required for dissolution of National Fuel Gas. Under the BCA, a corporate officer may dissolve a corporation without shareholder approval where: (1) The corporation has no assets; (2) the corporation has ceased doing business and does not intend to recommence doing business; (3) the corporation has not made any distributions of cash or property to its shareholders within the last 24 months and does not intend to make any distribution following its dissolution; and (4) the officer has given 30 days prior written notice of his intention to dissolve the corporation by mail or personal service to all known directors and shareholders at their last known address and no director or shareholder has objected to the proposed dissolution. The proposed amendment would permit an officer of the Company to dissolve National Fuel Gas without shareholder approval in these limited circumstances.[2]

The company estimates that the fees, commissions and expenses to be incurred in connection with the proposed transactions will be $165,500, consisting mostly of expenses associated with the printing, processing and mailing the proxy materials and costs associated with the Annual Meeting.

National Fuel Gas has filed its proxy solicitation materials and requests that its proposal to solicit proxies be permitted to become effective immediately, as provided in rule 62(d) under the Act. It appears to the Commission that the Declaration, with respect to the proposed solicitation of proxies, should be permitted to become effective immediately under rule 62(d).

It is Ordered, under rule 62 under the Act, that the Declaration regarding the proposed solicitation of proxies from National Fuel Gas shareholders become effective immediately, subject to the terms and conditions contained in rule 24 under the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–59 Filed 1–10–05; 8:45 am]

BILLING CODE 8010–01–P

[1] National Fuel Gas states that it has no present plans, agreements or commitments to transfer any significant portion of its assets to any other corporation (affiliated or unaffiliated) and that, by the Declaration, it is not requesting authority to engage in any such transaction.

[2] National Fuel Gas is not requesting authority to engage in any transaction that would constitute or result in its dissolution.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50944; File No. SR–DTC–2004–10]

Self-Regulatory Organizations; The Depository Trust Company; Order Granting Approval of a Proposed Rule Change To Implement Phase II of the IMS Service

December 29, 2004.

I. Introduction

On September 10, 2004, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change File No. SR–DTC–2004–10 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposed rule change was published in the **Federal Register** on November 29, 2004.[2] No comment letters were received. For the reasons discussed below, the Commission is now granting approval of the proposed rule change.

II. Description

DTC is seeking to implement Phase II of its Inventory Management System (''IMS'').[3] Currently, IMS allows DTC participants to:

(1) Stage their institutional deliveries received from a matching utility system (such as Omgeo's TradeSuite system) for automated settlement;

(2) Establish a predefined profile to allow greater control over the timing and order of their deliveries by transaction type and asset class;

(3) Reintroduce drop deliveries for night deliver orders (''NDOs''), broker-to-broker balance orders, and all other participant deliveries; and

(4) Warehouse deliveries with future settlement dates through the NDO function.

Today, deliveries from the National Securities Clearing Corporation's (''NSCC'') Continuous Net Settlement (''CNS'') system are automatically processed unless a participant otherwise instructs NSCC through an exemption. Other deliveries such as NDOs, along with authorized institutional and CNS deliveries, are processed by DTC at predefined times. All of these transactions may recycle (*i.e.*, pend) in the event of a position deficiency or a problem with system controls. These recycles are processed based on one of two recycle options: a ''first in first out'' process or a DTC preestablished recycle queue.

DTC is now seeking to implement Phase II to allow participants to customize the order in which their authorized night cycle deliveries, such as CNS and institutional deliveries, are submitted for processing and to provide participants with the ability to create profiles that instruct DTC's processing system how to attempt to complete their recycling deliveries that are recycling for insufficient position.

DTC currently recycles deliveries for insufficient position in a prescribed order based on transaction type and settlement value. To address their unique delivery requirements for recycling deliveries, some participants withhold their deliveries to DTC. For other participants, deliveries may not complete in their desired order.

IMS Phase II permits a participant to prepopulate a profile that ''customizes'' its position recycle order for settlement related transactions. Transactions will be processed in the prescribed order if there are sufficient shares. If there are insufficient shares to complete a high priority transaction, then transactions with a lower priority but with sufficient shares will be processed subject to other controls. This service will be optional, and the current recycle order will remain in effect unless profile changes are made.[4]

Participants will be able to promote their recycling transactions through 15022 messages or a new PBS screen in IMS if they have update capability. Participants will be able to promote transactions to the top of the recycle queue. Once a transaction is promoted, a participant will be able to promote another transaction higher or lower than the previously promoted transaction.

In order to recoup the costs of this development, participants will be billed $.045 for each delivery that is promoted. Participants will be charged $0.06 for each delivery that is ''customized'' by these profiles, including deliveries that are submitted using the current active to passive functionality. If a delivery is submitted and recycles based upon profile selection, the participant will not be double charged for the delivery.[5]

Participants will not be required to make systemic changes and will be able to continue processing their deliveries as they do today. All IMS features will be optional, and participants will be able to migrate to any or all features they deem valuable.

The new enhancements to the IMS service will extend and will improve participants' ability to control their deliveries and will permit users to determine how their deliveries should recycle in the system based on participant-defined profiles.

III. Discussion

Section 17A(b)(3)(F) of the Act requires among other things that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.[6] The Commission finds that DTC's proposed rule change is consistent with this requirement because the Phase II enhancements to the IMS service will extend a participant's ability to control its deliveries and will permit participants to determine how their deliveries recycle. This should increase efficiency in processing member transactions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR–DTC–2004–10) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[8]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–47 Filed 1–10–05; 8:45 am]

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[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 50690 (November 18, 2004), 69 FR 69433.

[3] The Commission approved a proposed rule change implementing Phase I of the IMS. Securities Exchange Act Release No. 48176 (July 14, 2003), 68 FR 43244 [File No. SR–DTC–2002–19]

[4] For example, unless a participant customizes its position recycle order, CNS will continue to have the highest priority, followed by value releases, *etc.*

[5] It will cost $0.06 to have a delivery submitted and recycled by IMS based upon the profile created

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50957; File No. SR–NYSE–2004–72]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. to Extend the Effective Date of Amendments, Approved Pursuant to File No. SR–NYSE–2002–36, From December 17, 2004 to January 31, 2005 To Conform With the Effective Date of Corresponding Rule Amendments Filed by the National Association of Securities Dealers, Inc. (''NASD'')

January 4, 2005.

Pursuant to section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Exchange Act'')[2] and Rule 19b–4[3] thereunder, notice is hereby given that on December 16, 2004, the New York Stock Exchange, Inc. (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Changes

The Exchange proposes to extend the effective date of amendments, approved pursuant to File No. SR–NYSE–2002–36, from December 17, 2004, to January 31, 2005, to conform with the effective date of corresponding rule amendments filed by the National Association of Securities Dealers, Inc. (''NASD''). The amendments, collectively known as the ''Internal Controls'' amendments, consist of changes to Rules 342 (''Offices—Approval, Supervision and Control''), 401 (''Business Conduct''), 408 (''Discretionary Power in Customers' Accounts'') and 410 (''Records of Orders'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule changes. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

On June 17, 2004, the Commission approved amendments to NYSE rules to strengthen the supervisory procedures and internal controls of members and member organizations.[4] The amendments, collectively known as the ''Internal Controls'' amendments, consist of changes to Rules 342 (''Offices—Approval, Supervision and Control''), 401 (''Business Conduct''), 408 (''Discretionary Power in Customers' Accounts'') and 410 (''Records of Orders'').

Amendment No. 2 to the filing, dated April 25, 2003, established an effective date for the amendments of six months from the date of their approval by the Commission. Accordingly, the current effective date is December 17, 2004. This six-month ''phase-in'' period was intended to allow member organizations sufficient time to develop and implement the policies and procedures necessary to be in compliance with the proposed amendments.

During the development of the Internal Controls amendments, the NASD was working in conjunction with the Exchange and the Commission to develop substantially similar rule amendments. These amendments were also approved on June 17, 2004.[5] Ultimately, an effective date of January 31, 2005, was established for the NASD amendments.[6] The Exchange requests an extension of its previously approved effective date of December 17, 2004, to January 31, 2005. The Exchange believes that conforming the effective date of its Internal Controls amendments to the NASD's effective date will be beneficial to dual NYSE/NASD member organizations in that it will eliminate any confusion that may otherwise arise in connection with staggered implementation dates. Further, coordinating the effective dates will facilitate the issuance of any joint NYSE/NASD materials to membership to clarify practical aspects of the amendments.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of the Securities Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with the requirements of section 6(b)(5)[7] of the Exchange Act. Section 6(b)(5) requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has been filed pursuant to section 19(b)(3)(A)[8] of the Exchange Act and paragraph (f)(6) of Rule 19b–4 thereunder, and is therefore immediately effective upon filing with the Commission. The Commission, at any time within 60 days of the filing of a proposed rule change pursuant to section 19(b)(3)(A) of the Act, may summarily abrogate the proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[9]

The Exchange requests that the Commission waive both the five-day notice and 30-day pre-operative requirements contained in Rule 19b–

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.19b–4.

[4] *See* Release No. 34–49882 (June 17, 2004); 69 FR 35108 (June 23, 2004) (File No. SR–NYSE–2002–36).

[5] *See* Release No. 34–49883 (June 17, 2004); 69 FR 35092 (June 23, 2004) (File No. SR–NASD–2002–162).

[6] *See* NASD Notice to Members 04–71.

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 15 U.S.C. 78s(b)(3)(C).

4(f)(6)(iii).[10] The Exchange has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date it was filed, or such shorter time as the Commission may designate. The Exchange believes good cause exists to grant such waivers because conforming the effective date of its Internal Controls amendments to the NASD's effective date will be beneficial to dual NYSE/NASD member organizations in that it will eliminate any confusion that may otherwise arise in connection with staggered implementation dates. Further, coordinating the effective dates will facilitate the issuance of any joint NYSE/NASD materials to members to clarify practical aspects of the amendments.

The Commission believes that waiver of the five-day notice and the 30-day pre-operative delay is consistent with the protection of investors and the public interest because it will allow the NYSE to minimize confusion that may otherwise occur due to staggered implementation dates as firms make any required procedural or system changes. Furthermore, this waiver will facilitate the issuance of any joint guidance by the NYSE and NASD. For these reasons, the Commission designates the proposed rule change to be effective and operative upon filing with the Commission.[11]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2004–72 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NYSE–2004–72. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File number SR–NYSE–2004–72 and should be submitted on or before February 1, 2005.

For the Commission, by the Division of Market Regulation, pursuant to the delegated authority.[8]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–56 Filed 1–10–05; 8:45 am]

BILLING CODE 8010–01–P

[10] *See* telephone conversation between Stephen Kasprzak, Senior Special Counsel, NYSE and Lourdes Gonzalez, Assistant Chief Counsel, SEC, on January 3, 2005. Under subparagraph (f)(6)(iii) of Rule 19b–4, the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file notice of the proposed rule change at least five business days beforehand. 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of accelerating the effective date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50958; File No. SR–Phlx–2004–93]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Eliminate the Maximum Order Delivery Size Over the AUTOM System

January 4, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 15, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx is proposing to adopt amendments to Phlx Rules 1080(b)(i)(A), (B), and (C), Philadelphia Stock Exchange Automated Options Market (AUTOM) [3] and Automatic Execution System (AUTO–X), reflecting a system change that would eliminate the maximum eligible order size of 5,000 contracts for delivery on the AUTOM System. Under the proposal, there would no longer be any limitation on the size of orders eligible for delivery via AUTOM.

Below is the text of the proposed rule change. Proposed deletions are bracketed.

Philadelphia Stock Exchange Automated Options Market (AUTOM) and Automatic Execution System (AUTO–X)

Rule 1080. (a) No change.
(b) Eligible Orders.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4

[3] AUTOM is the Exchange's electronic order delivery, routing, execution, and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for AUTOM's automatic execution features, AUTO–X, Book Sweep, and Book Match. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange trading floor. *See* Exchange Rule 1080.

(i) The following types of orders are eligible for entry into AUTOM:

(A) Agency orders [up to the maximum number of contracts permitted by the Exchange] may be entered. [Agency orders up to 5,000 contracts, depending on the option, are eligible for AUTOM order delivery, subject to the approval of the Options Committee.] The following types of agency orders are eligible for AUTOM; day, GTC, Immediate or Cancel (''IOC''), market, limit, all or none, or better, simple cancel, simple cancel to reduce size (cancel leaves), cancel to change price, cancel with replacement order, and possible duplicate orders.

(B) Respecting non-Streaming Quote Options, on-floor orders for the proprietary account(s) of non-SQT ROTs and specialists via electronic interface with AUTOM may be entered[, up to the maximum number of contracts permitted by the Exchange], subject to the restrictions on order entry set forth in Commentary .04 of this Rule. [Orders up to 5,000 contracts, depending on the option, are eligible for AUTOM order delivery.] The following types of orders for the proprietary account(s) of ROTs and specialists are eligible for entry via electronic interface with AUTOM: GTC, day limit and simple cancel.

(C) Off-floor broker-dealer limit orders[, up to the minimum number of contracts permitted by the Exchange], subject to the restrictions on order entry set forth in Commentary .05 of this Rule, may be entered. [Generally, orders up to 5,000 contracts, depending on the option, are eligible for AUTOM order delivery on an issue-by-issue basis, subject to the approval of the Options Committee. The Options Committee may determine to increase the eligible order delivery size to an amount greater than 5,000 contracts, on an issue-by-issue basis.] The following types of broker-dealer limit orders are eligible for AUTOM: day, GTC, IOC, simple cancel, simple cancel to reduce size (cancel leaves), cancel to change price, cancel with replacement order. For purposes of this Rule 1080, the term ''off-floor broker-dealer'' means a broker-dealer that delivers orders from off the floor of the Exchange for the proprietary account(s) of such broker-dealer, including a market maker located on an exchange or trading floor other than the Exchange's trading floor who elects to deliver orders via AUTOM for the proprietary account(s) of such market maker.

(ii) and (iii) No change.

(c)–(k) No change.

Commentary: No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to increase the number of orders that are eligible for delivery over the AUTOM System by eliminating the current 5,000 contract maximum size limitation on orders delivered via AUTOM.

Currently, Exchange Rules 1080(b)(i)(A), (B), and (C) establish a maximum eligible size of 5,000 contracts for orders delivered via AUTOM. Orders delivered via AUTOM with a size greater than 5,000 contracts are currently routed back to the point of origin of the order (*i.e.*, to the member or member organization that delivered the order), or to a Floor Broker designated by the member or member organization that delivered the order. The proposed rule change would eliminate any limitation on the eligible size of AUTOM-delivered orders; thus, eligible orders of any size could be delivered via AUTOM.

The Exchange believes that the elimination of the 5,000 contract maximum eligible AUTOM order delivery size should result in a greater number of orders and contracts delivered via the AUTOM System, which should result in a greater number of orders received and handled electronically on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[4] in general, and furthers the objectives of Section 6(b)(5) of the Act[5] in particular, in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest and promote just and equitable principles of trade, by eliminating the maximum size limitation for orders delivered via AUTOM, thus allowing eligible orders of any size to be delivered electronically to the Exchange via AUTOM.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received by the Exchange.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[6] and Rule 19b–4(f)(5)[7] thereunder. The Phlx has represented that the proposal effects a change in an existing order-entry or trading system of a self-regulatory organization that (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not have the effect of limiting the access to or availability of the system. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest or for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml)*; or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2004–93 on the subject line.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A)(iii).

[7] 17 CFR 19b-4(f)(5).

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–93. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–93 and should be submitted on or before February 1, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–41 Filed 1–10–05; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice 4954]

Culturally Significant Objects Imported for Exhibition Determinations: ''Recarving China's Past: The Art, Archaeology and Architecture of the 'Wu Family Shrines' ''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Recarving China's Past: The Art, Archaeology and Architecture of the 'Wu Family Shrines,' '' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at The Princeton University Art Museum, from on or about March 5, 2005, until on or about June 26, 2005, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Richard Lahne, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202) 453–8058). The address is U.S. Department of State, SA–44, 301 4th Street, SW. Room 700, Washington, DC 20547–0001.

Dated: January 3, 2005.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 05–507 Filed 1–10–05; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Applications of Skylink Airways, Inc. for Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2005–1–1); Dockets OST–2004–17171 and OST–2004–17172.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not (1) issue an order finding SkyLink Airways, Inc., fit, willing, and able, and awarding it a certificate of public convenience and necessity to engage in foreign scheduled air transportation of persons, property and mail to certain countries, and (2) defer action on SkyLink's application for interstate authority and the remainder of its foreign authority.

DATES: Persons wishing to file objections should do so no later than January 22, 2005.

ADDRESSES: Objections and answers to objections should be filed in Dockets OST–2004–17171 and OST–2004–17172 and addressed to U.S. Department of Transportation, Docket Operations, (M–30, Room PL–401), 400 Seventh Street, SW., Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Vanessa R. Wilkins, Air Carrier Fitness Division (X–56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–9721.

Dated: January 5, 2005.

Karan K. Bhatia,

Assistant Secretary for Aviation and International Affairs.

[FR Doc. 05–476 Filed 1–10–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2005–1]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before January 26, 2005.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number FAA–2004–19957] by any of the following methods:

[8] 15 CFR 200.30–3(a)(12).

• Web Site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.

• Fax: 1–202–493–2251.

• Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.

• Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

• Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Tim Adams (202) 267–8033, Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on January 4, 2005.

Anthony F. Fazio,

Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2004–19957.

Petitioner: Spirit Airlines, Inc.

Section of 14 CFR Affected: 14 CFR 121.354(b).

Description of Relief Sought: To allow Spirit Airlines, Inc., to operate two of its aircraft for a period not to exceed 40 days after March 29, 2005, without an approved terrain awareness and warning system and an approved terrain situations awareness display installed on those aircraft.

[FR Doc. 05–474 Filed 1–10–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Exemption Applications

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of application delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5177(c), RSPA is publishing the following list of exemption applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each associated application.

FOR FURTHER INFORMATION CONTACT: Delmer Billings, Office of Hazardous Materials Exemptions and Approvals, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001, (202) 366–4535.

Key to ''Reason for Delay''

1. Awaiting additional information from applicant
2. Extensive public comment under review
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis
4. Staff review delayed by other priority issues or volume of exemption applications

Meaning of Application Number Suffixes

N—New application
M—Modification request
PM—Party to application with modification request.

Issued in Washington, DC, on January 4, 2005.

R. Ryan Posten,

Exemptions Program Officer, Office of Hazardous Materials Safety, Exemptions & Approvals.

Application No.	Applicant	Reason for delay	Estimated date of completion
	New Exemption Applications		
12381–N	Ideal Chemical & Supply Co. Memphis, TN	2	01–31–2005
12412–N	Great Western Chemical Company Portland, OR	3	01–31–2005
12950–N	Walnut Industries, Inc. Bensalem, PA	4	01–31–2005
12797–N	Environmental Quality Co. Belleville, MI	4	01–31–2005
13054–N	CHS Transportation Mason City, IA	4	02–28–2005
13176–N	Union Pacific Railroad Company Omaha, NE	4	01–31–2005
12949–N	Railway Progress Institute, Inc. Alexandria, VA	4	01–31–2005
13281–N	The Dow Chemical Company Midland, MI	4	01–31–2005
13265–N	Aeropres Corporation Shreveport, LA	4	02–28–2005
13461–N	FIBA Technologies, Inc. Westboro, MA	4	01–31–2005
13346–N	Stand-By-Systems, Inc. Dallas, TX	1	02–28–2005
13347–N	ShipMate, Inc. Torrance, CA	4	02–28–2005
13341–N	National Propane Gas Association Washington, DC	1	02–28–2005
13302–N	FIBA Technologies, Inc. Westboro, MA	4	02–28–2005
13314–N	Sunoco Inc. Philadelphia, PA	4	01–31–2005
13309–N	OPW Engineered System Lebanon, OH	4	01–31–2005
13295–N	Taylor-Wharton Harrisburg, PA	1	02–28–2005
13266–N	Luxfer Gas Cylinders Riverside, CA	1	02–28–2005
13636–N	Timberline Environmental Services Cold Springs, CA	4	02–28–2005
13585–N	Texaco Ovonic Hydrogen Systems, L.L.C. Rochester Hills, MI	4	01–31–2005
13582–N	Linde Gas LLC (Linde) Independence, OH	4	01–31–2005
13563–N	Applied Companies Valencia, CA	4	01–31–2005
13560–N	Texaco Ovonic Hydrogen Systems L.L.C. (TOHS) Rochester Hills, MI	4	01–31–2005
13554–N	The Fertilizer Institute Washington, DC	4	01–31–2005
13547–N	CP Industries McKeesport, PA	4	01–31–2005
13484–N	Air Liquide America L.P. Houston, TX	4	01–31–2005

Application No.	Applicant	Reason for delay	Estimated date of completion
13482–N	U.S. Vanadium Corporation (Subsidiary of Strategic Minerals Corporation) Niagara Falls, NY.	4	01–31–2005
13599–N	Air Products and Chemicals, Inc. Allentown, PA	4	02–28–2005
13597–N	Piexon USA Inc. North Canton, OH	4	02–28–2005
13228–N	AirSep Creekside Corp. Buffalo, NY	4	01–31–2005
13422–N	Puritan Bennett Plainfield, IN	3	02–28–2005
13188–N	General Dynamics Lincoln, NE	1	02–28–2005
13183–N	Becton Dickinson Sandy, UT	4	02–28–2005
13077–N	MacIntyre Middlebury, VT	4	01–31–2005
	Modification to Exemptions		
11769–M	Great Western Chemical Company Portland, OR	2	01–31–2005
11769–M	Great Western Chemical Company Portland, OR	2	01–31–2005
7277–M	Structural Composites Industries Pomona, CA	3	02–28–2005
13027–M	Hernco Fabrication & Services Midland, TX	4	01–31–2005
11579–M	Dyno Nobel, Inc. Salt Lake City, UT	4	01–31–2005
11537–M	American Development Corporation Vanceboro, NC	2	01–31–2005
11241–M	Rohm and Haas Co. Philadelphia, PA	1	01–31–2005
11537–M	Hawkins, Inc. Minneapolis, MN	2	01–31–2005
7280–M	Department of Defense Ft. Eustis, VA	4	01–31–2005
10915–M	Luxfer Gas Cylinders (Composite Cylinder Division) Riverside, CA	1	01–31–2005
10878–M	Tankcon FRP Inc. Boisbriand, Qc	1, 3	01–31–2005
9421–M	Taylor-Wharton (Gas & Fluid Control Group) Harrisburg, PA	4	01–31–2005
12022–M	Taylor-Wharton (Gas & Fluid Control Group) Harrisburg, PA	4	01–31–2005
11537–M	Interstate Chemical Company, Inc. Hermitage, PA	2	01–31–2005
10882–M	Espar Products, Inc. Mississauga, Ontario, Canada	4	01–31–2005
8162–M	Structural Composites Industries Pomona, CA	3	02–28–2005
8718–M	Structural Composites Industries Pomona, CA	3	02–28–2005
10019–M	Structural Composites Industries Pomona, CA	3	02–28–2005
12065–M	Petrolab Company Latham, NY	4	01–31–2005
11537–M	JCI Jones Chemicals, Inc. Milford, VA	2	01–31–2005
11769–M	Hydrite Chemical Company Brookfield, WI	2	01–31–2005

[FR Doc. 05–473 Filed 1–10–05; 8:45 am]

BILLING CODE 4910–60–M

UNITED STATES INSTITUTE OF PEACE

Announcement of the Spring 2005 Solicited Grant Competition Grant Program

AGENCY: United States Institute of Peace.

ACTION: Notice.

SUMMARY: The Agency announces its upcoming Spring 2005 Solicited Grant Competition. The Solicited Grant competition is restricted to projects that fit specific themes and topics identified in advance by the Institute of Peace.

The themes and topics for the Spring 2005 Solicited competition are:

- Solicitation A: Promoting Sustainable Peace in Societies Emerging from Violent Conflict
- Solicitation B: Conflict and Peacemaking in the Muslim World

Deadline: March 1, 2005, Application Material Available on Request.

DATES: Receipt of Application: March 1, 2005. Notification Date: September 31, 2005.

ADDRESSES: For more information and an application package: United States Institute of Peace, Grant Program, Solicited Grants, 1200 17th Street, NW., Suite 200, Washington, DC 20036–3011, (202) 429–3842 (phone), (202) 833–1018 (fax), (202) 457–1719 (TTY), e-mail: *grants@usip.org.*

Application material available on-line: *http://www.usip.org/grants.*

FOR FURTHER INFORMATION CONTACT: The Grant Program, Phone (202) 429–3842, E-mail: *grants@usip.org.*

Dated: January 5, 2005.

Erin Singshinsuk,

Director, Office of Administration.

[FR Doc. 05–459 Filed 1–10–05; 8:45 am]

BILLING CODE 6820–AR–M

UNITED STATES INSTITUTE OF PEACE

Announcement of the Spring 2005 Unsolicited Grant Competition Grant Program

AGENCY: United States Institute of Peace.

ACTION: Notice.

SUMMARY: The Agency announces its upcoming Spring 2005 Unsolicited Grant Program, which offers support for research, education and training, and the dissemination of information on international peace and conflict resolution. The Unsolicited competition is open to any project that falls within the Institute's broad mandate of international conflict resolution.

Deadline: March 1, 2005, Application Material Available on Request.

DATES: Receipt of Application: March 1, 2005. Notification Date: September 31, 2005.

ADDRESSES: For Application Package: United States Institute of Peace, Grant Program, 1200 17th Street, NW., Suite 200, Washington, DC 20036–3011, (202) 429–3842 (phone), (202) 833–1018 (fax), (202) 457–1719 (TTY), E-mail: *grants@usip.org.*

Application material available on-line: *http://www.usip.org/grants.*

FOR FURTHER INFORMATION CONTACT: The Grant Program, Phone (202) 429–3842, E-mail: *grants@usip.org.*

Dated: January 5, 2004.

Erin Singshinsuk,

Director, Office of Administration.

[FR Doc. 05–460 Filed 1–10–05; 8:45 am]

BILLING CODE 6820–AR–M

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0161]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to report medical expenses paid in connection with claims for pension and other income-based benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 14, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to ''OMB Control No. 2900–0161'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Medical Expense Report, VA Form 21–8416.

OMB Control Number: 2900–0161.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 21–8416 is completed by beneficiaries in receipt of income-based benefits and claimants claiming income-based benefits to report medical expenses paid in connection with claims for pension and other income-based benefits. Unreimbursed medical expenses paid by a beneficiary or claimant may be excluded from their countable income. VA uses the data collected to determine the claimant's entitlement to improved pension and the appropriate rate payable.

Affected Public: Individuals or households.

Estimated Annual Burden: 48,200 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 96,400.

Dated: December 29, 2004.

By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 05–489 Filed 1–10–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0606]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to collect or recover cost for medical care or services provided or furnished to a veteran by VA for non-service-connected conditions.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 14, 2005.

ADDRESSES: Submit written comments on the collection of information to Ann Bickoff, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *ann.bickoff@mail.va.gov.* Please refer to ''OMB Control No. 2900–0606'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Ann Bickoff at (202) 273–8310.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C., 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Regulation for Submission of Evidence—Title 38 CFR 17.1C1(a)(2).

OMB Control Number: 2900–0606.

Type of Review: Extension of a currently approved collection.

Abstract: Under the provisions of 38 CFR, § 17.101(a)(4) a third party payer is liable for reimbursing VA for care and services VA provided to a veteran with non-service-connected conditions continues to have the option of paying either the billed charges or the amount the health plan demonstrates it would pay to providers other than entities of the United States for the same care or services in the same geographic area. If the amount submitted for payment is less than the amount billed, VA will

accept the submission as payment, subject to verification at VA's discretion. VA may request the third-party payer to submit evidence or information to substantiate the appropriateness of the payment amount (*e.g.*, health plan policies, provider agreements, medical evidence, and proof of payment to other providers demonstrating the amount paid for the same care and services VA provided). The information is needed to determine whether the third-party payer has met the test of properly demonstrated its equivalent private sector provider payment amount for the same care or services and within the same geographic area as provided by VA.

Affected Public: Business or other for-profit, Individuals or households, not for profit institutions, farms, and State, local or tribal government.

Estimated Total Annual Burden: 800 hours.

Estimated Average Burden per Respondent: 2 hours.

Frequency of Response: On occasion.

Estimated Number of Respondents: 400.

By direction of the Secretary.

Dated: December 29, 2004.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 05–490 Filed 1–10–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0601]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to refinance a delinquent VA-guaranteed loan with a lower interest rate.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 14, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0601'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub.L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Loan Guaranty: Requirements for Interest Rate Reduction Refinancing Loans.

OMB Control Number: 2900–0601.

Type of Review: Extension of a currently approved collection.

Abstract: A veteran may refinance an outstanding VA guaranteed, insured, or direct loan with a new loan at a lower interest rate provided that the veteran still owns the property used as security for the loan. The new loan will be guaranteed only if VA approves it in advance after determining that the borrower, through the lender, has provided reasons for the loan deficiency, and has provided information to establish that the cause of the delinquency has been corrected, and qualifies for the loan under the credit standard provisions.

Affected Public: Business or other for profit.

Estimated Annual Burden: 39 hours.

Estimated Annual Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 78.

Dated: December 29, 2004.

By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 05–491 Filed 1–10–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0116]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed from penal institutions regarding incarcerated VA beneficiaries.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 14, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0116'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Notice to Department of Veterans Affairs of Veteran or Beneficiary Incarcerated in Penal Institution, VA Form 21–4193.

OMB Control Number: 2900–0116.

Type of Review: Extension of a currently approved collection.

Abstract: The data collected on VA Form 21–4193 is used to determine whether a beneficiary's VA compensation or pension rate should be reduced or terminated when the beneficiary is incarcerated in a penal institution in excess of 60 days after conviction.

Affected Public: Federal Government, and State, Local or Tribal Government.

Estimated Annual Burden: 416 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 1,664.

Dated: December 29, 2004.

By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 05–492 Filed 1–10–05; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register

Vol. 70, No. 7

Tuesday, January 11, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

Correction

In notice document E4–3911 beginning on page 74 in the issue of Monday, January 3, 2005 make the following correction:

On page 74, in the table, under the ''Period'' heading, in the ninth entry ''2/31/04'' should read ''12/31/04 ''.

[FR Doc. Z4–3911 Filed 1–10–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,
January 11, 2005

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Colorado Butterfly Plant; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AJ07

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Colorado Butterfly Plant

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Colorado butterfly plant (*Gaura neomexicana* ssp. *coloradensis*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,432 hectares (ha) (3,538 acres (ac)) along approximately 82 kilometers (km) (51 stream miles (mi)) fall within the boundaries of the critical habitat designation located in Laramie and Platte Counties in Wyoming. The designation excludes 30% of private and municipality lands through Wildlife Extension Agreements. Military lands as well as other areas within its range in Nebraska and Colorado are not included.

DATES: This final rule is effective February 10, 2005.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the Wyoming Field Office, U.S. Fish and Wildlife Service, 4000 Airport Parkway, Cheyenne, WY 82001.

FOR FURTHER INFORMATION CONTACT: Brian T. Kelly, Field Supervisor, Wyoming Field Office (see **ADDRESSES** section) (telephone (307) 772–2374; facsimile (307) 772–2358).

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 445 species or 36 percent of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to section 7 of the Act.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result of this consequence, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially imposed deadlines. This situation in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the costs of preparation and publication of the designation, the analysis of the economic effects and the costs of requesting and responding to public comments, and, in some cases, the costs of compliance with National Environmental Policy Act. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and these associated costs directly reduce the scarce funds available for direct and tangible conservation actions.

Background

For more information on *G. n.* ssp. *coloradensis*, refer to the proposed critical habitat rule (August 6, 2004, 69 FR 47834).

Previous Federal Actions

On August 6, 2004, we published the proposed rule to designate critical habitat for *G. n.* ssp. *coloradensis* (69 FR 47834) with a 60-day comment period. In that proposed rule (beginning on page 47837), we included a summary of the previous Federal actions completed prior to publication of the proposal. On September 24, 2004, the Service announced the availability of the Draft Economic Analysis of Critical Habitat Designation for the Colorado Butterfly

Plant (Draft Economic Analysis) and the Draft Environmental Assessment for Proposal of Critical Habitat for the Colorado Butterfly Plant (Draft EA) (69 FR 57250), and extended the comment period on all three documents through October 25, 2004. No requests for public hearings were received.

Summary of Comments and Recommendations

During the comment period, we contacted appropriate Federal, State, and local agencies and other interested parties and invited them to comment on the proposed critical habitat rule. We contacted interested parties (including elected officials, media outlets, local jurisdictions, and interest groups) through a press release and related faxes, mailed announcements, telephone calls, and e-mails. On September 24, 2004, the Service reopened a 30-day comment period on the draft economic analysis, draft EA, and proposed rule (69 FR 57250). We received a total of 13 comments. One comment letter was received from the State of Wyoming, five comment letters from peer reviewers, four comments from individual landowners, two comments representing four environmental groups, and one comment letter from the Wyoming Stockgrowers Association (WSA). Of the public comments, four comments opposed designation or favored reduced designation, and one comment supported designation and favored expanding the designation.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited review from at least three independent specialists/experts regarding proposed rules. The purpose of such review is to ensure that our designation is based on scientifically sound data, assumptions, and analyses.

We solicited opinions from six independent experts to peer review the proposed critical habitat designation. The individuals were asked to review and comment on the specific assumptions and conclusions regarding the proposed designation of critical habitat. Five of the six peer reviewers provided comments, and we considered all comments. All peer reviewers supported the approach we used in our proposal that emphasized the importance of conserving riparian habitat in the context of upland habitat within stream reaches where *Gaura neomexicana* ssp. *coloradensis* occurs. The reviewers generally agreed that our methods and conclusions were appropriate and necessary for the conservation of the *G. n.* ssp. *coloradensis*, and that the information we used was reasonably complete and appropriate regarding the best scientific information available for this species. We grouped the comments by issue.

Peer Review Comments

Comment 1 (Peer): One reviewer suggested that the Service consider including drainages downstream for the purpose of linking proposed Units 2 and 3, 2 and 4, and 5 and 6, allowing for potential colonization and expansion of populations via seed dispersal.

Our Response: In preparation of this designation, we considered the need for connectivity among subpopulations and habitat for this species, made a substantial effort to provide for linkage of individual subpopulations, and provide for colonization downstream via seed dispersal. We believe that the current extent of contiguous critical habitat provides for the conservation needs of the species and allows for colonization of new habitats and expansion of populations. We agree that preserving connectivity between known subpopulations and occupied habitat is valuable for the conservation of *G. n.* ssp. *coloradensis.*

We note that if new information regarding suitability of habitat occurring downstream and PCEs becomes available, we will consider this information for future recovery efforts. However, this information is not available at this time.

Comment 2 (Peer): One reviewer suggested that the criteria used to identify critical habitat adequately circumscribes areas that fulfill many of the PCEs of the species and that these criteria focus on ecological processes operating in small patch and large patch communities. Uncertainty about some aspects of the species' life history and habitat requirements (*e.g.,* pollinators, population dynamics, seed viability) suggests that another criterion might be useful to address some of the landscape-scale factors (drought, fire, windstorms, and herbivory) operating on individuals, metapopulations, and populations in the communities.

Our Response: We agree with the reviewer that additional information on the species life history, ecology, and habitat requirements would be useful in preparing this designation. However, this designation is based on the best available information available to us, and we are doing our best to finalize the designation within the time frame of the court order and within our budgetary constraints. If, at any time, additional information becomes available to guide us, we well consider the information as appropriate. We believe that this is useful in the recovery planning process and should be explored by a recovery team in the near future.

Comment 3 (Peer): One reviewer suggested that it would be useful to obtain some measure of landscape ''intactness'' for each known population. Such analysis might provide a more optimal configuration for circumscription of sites designated as critical, suggest areas with the highest or lowest potential of providing the PCEs, and identify management strategies that would be most beneficial to the species as a whole.

Our Response: We agree with the general approach and analysis provided by the reviewer. As stated in the response to Comment 2, we believe that such an analysis and approach is beyond the scope of this critical habitat designation, given the deadlines we face to completing the designation process, and would be appropriate to the recovery planning process in the future. Information derived from such an analysis may provide valuable information to be used in the long-term conservation of the species and may facilitate its delisting in the future.

Comment 4 (Peer): One reviewer expressed question and concern regarding the impact of groundwater withdrawal and water development projects within suitable habitat. Recognizing the need for periodic disturbance, including flooding, as necessary to control competing vegetation, this reviewer asked if all the sites proposed as critical habitat support hydrologic conditions of creating and maintaining habitat for the species.

Our Response: All sites included in this final critical habitat designation support hydrological conditions necessary to create and maintain habitat for the species (*i.e.,* they contain PCE 4 as described in this rule). Based on surveys conducted during the summer of 2004, we found that some portions of the proposed critical habitat did not contain necessary hydrological conditions—these areas have been dropped from the final critical habitat designation. While we believe that water development and flood control has, generally, curtailed the level of disturbance associated with creation of suitable habitat for colonization, our observations during surveys of 2004 (including over 80 percent of species' extant range of occurrence) revealed that such hydrological conditions are present within all critical habitat units.

Comment 5 (Peer): One reviewer stated that the language used in the proposed rule that critical habitat provides little additional protection to

most species while consuming significant amounts of conservation resources was inappropriate. The reviewer pointed out that the Act requires designation of critical habitat, and that if the Service had not been so slow to designate, the agency would not be overrun by lawsuits.

Our Response: As discussed in the sections ''Designation of Critical Habitat Provides Little Additional Protection to Species,'' ''Role of Critical Habitat in Actual Practice of Administering and Implementing the Act,'' and ''Procedural and Resource Difficulties in Designating Critical Habitat'' and other sections of this and other critical habitat designations, we believe that, in most cases, conservation mechanisms provided through section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, the section 10 incidental take permit process, and cooperative programs with private and public landholders and tribal nations provide greater incentives and conservation benefits than does the designation of critical habitat. This is true irrespective of the amount of litigation which may be occurring at any given time.

Comment 6 (Peer): One reviewer stated that the most important factor for the conservation of the *G. n. ssp. coloradensis* is preservation and management of habitat. The reviewer agreed that designation of critical habitat on private land does not necessarily benefit the species. Similarly, another reviewer stated that in Wyoming, section 7 consultations are the primary plant conservation mechanism, and that there are no incentives provided by this mechanism for conservation on private lands. Most of the threats to the *G. n.* ssp. *coloradensis* on private lands, including weed invasion, indiscriminate herbicide application, habitat fragmentation, some water development, and/or particular grazing or haying practices, involve no Federal funds (or other Federal nexus) resulting in no requirement for section 7 consultation under the Act.

Our Response: We agree. This is why we have chosen to pursue Wildlife Extension Agreements with landowners in lieu of designating critical habitat on those properties. These agreements provide for implementation of on the ground conservation actions for *G. n.* ssp. *coloradensis* (for a more detailed discussion of these agreements, see ''Exclusions Under Section 4(b)(2) of the Act'' section).

Comment 7 (Peer): One reviewer noted that the critical habitat proposal states that excessive grazing can change essential habitat conditions but can be used as a tool to maintain open habitat. The reviewer also notes that excessive grazing can directly and adversely affect *G. n.* ssp. *coloradensis* plants, particularly their ability to set seed. Similarly, another reviewer stated that it was appropriate to point out that grazing and haying provide important management tools with which to maintain open habitat for the species, and that the species has historically occupied, and currently continues to occupy, rangelands.

Our Response: We agree that while grazing can be an important land management tool, overgrazing or grazing at critical times can adversely affect the plant. Grazing management and the maintenance of suitable rangeland production and health are key components to the 11 WEAs the Service has secured with landowners to provide for conservation of *G. n.* ssp. *coloradensis.* To address this issue, we have included established, annual monitoring guidelines and methodology (Natural Resources Conservation Service, 2001) to evaluate rangeland health, in each WEA. In one WEA, currently in place, the Service paid for the construction of a fence exclosure to protect a population from overgrazing.

Comment 8 (Peer): One reviewer pointed out that there is no specific mention of weed control in the discussion of the Integrated Natural Resources Management Plan (INRMP) for Warren Air Force Base (WAFB), and that this is a major threat to *G. n.* ssp. *coloradensis* there.

Our Response: We summarized the goals and objectives as identified in the INRMP, which tend to be general in nature (see ''Exclusions From Critical Habitat, Lands Under U.S. Air Force Jurisdiction'' section). However, as pointed out by another reviewer, WAFB has demonstrated a clear commitment to wise land stewardship for this species over the past several years, and the Environmental Management Office of WAFB has cooperated with the Wyoming Natural Diversity Database (WNDD) staff to monitor populations as well as fund *G. n.* ssp. *coloradensis* conservation research on weed control, competition with other plants, and population genetic variation (*e.g.,* Mountain West Environmental Services 1985, Fertig 2001, Munk *et al.* 2002, Tuthill and Brown 2002, Heidel 2004a and 2004b). Weed control, in particular, is an important part of ongoing discussions and land management efforts between the Service and WAFB, and is included in the ''Conservation and Management Plan for the Colorado Butterfly Plant and Preble's Meadow Jumping Mouse on F.E. Warren Air Force Base,'' a management plan prepared by the Colorado Natural Heritage Program (CNHP) for WAFB, in cooperation with the WNDD and the Service (Grunau *et al.* 2004).

State Agencies

We received one comment letter from the Wyoming Department of Agriculture (WDA), and issues raised by WDA are addressed below.

Comment 9 (State): The WDA had significant concerns about the potential economic impact to agricultural producers. Specific concerns included: (1) The cost share program between Partners for Fish and Wildlife (PFW) and ranchers for fencing core subpopulations, (2) costs incurred from delay of haying and herbicide application, (3) livestock grazing management changes recommended by the Service, and (4) WEA participation by ranchers in Laramie County.

Our Response: It appears as if the WDA is referring to an early draft form of a WEA that was made available to the Wyoming Stockgrowers Association and landowners early in the process for discussion and comments. Since that time, WEAs have been modified considerably based on extensive discussion and cooperation between individual landowners and the Service. Eleven WEAs were ultimately secured between landowners and the Service, providing protection to, and enabling the Service to exclude from final critical habitat designation, up to 2,564 ac (1,038 ha) along 37 mi (59 km) of riparian habitat. In only one of these agreements did the Service recommend building a fence to enclose a population of *G. n.* ssp. *coloradensis.* While the PFW Program does typically involve a 50 percent cost share, in this particular case the PFW paid 100 percent of cost for both materials and construction. In the future, if the Service determines that similar fencing surrounding a subpopulation of *G. n.* ssp. *coloradensis* would be helpful to meet the conservation needs of the plant on a particular property, the Service would use a similar cost structure.

Regarding the second part of the comment about delay of haying, the WEAs secured with landowners whose properties are managed, at least in part, for hay production, outline an approach whereby the landowner cooperates and communicates with the Service on an annual basis to facilitate our understanding of how the timing of harvest may impact the plant. At this time, more information is needed about this issue. The WEAs provide an

opportunity for the landowners and the Service to coordinate efforts of hay production and population data collection, respectively, to facilitate the conservation needs of the plant without imposing undue burden on the landowner. It is important to emphasize that these agreements were arrived at through discussions between the Service and each individual landowner to ensure the particular needs of the landowner were met. If future data collection on a particular landowner's parcel were to suggest that delay of hay cutting would be beneficial to the plant, then similar discussion would ensue toward reaching an agreement regarding how to meet the needs of the plant and, at the same time, meet the needs of the landowner. Such discussion also would consider whether the landowner would need monetary compensation. Thus, each agreement is individualized based on the unique situation of the landowner and the needs of the plant on that property. There are no set requirements of the Service that will cause undue burden, financial or otherwise, on the landowner.

Regarding the second part of the comment, need for herbicide application, the Service is fully aware of, and supports, the need to control noxious weeds on private and public property. Within all WEAs, the Service has recommended a manner in which herbicide may be applied in order to control species such as Canada thistle (*Cirsium arvense*) and leafy spurge (*Euphorbia esula*), at the same time as protecting populations of *G. n.* ssp. *coloradensis.* Again, such voluntary agreements involve the individual landowner working with the Service to address the landowner's needs while providing protection to the plant. Indeed, the Service has recognized for years that these two weed species in particular will, if left uncontrolled, lead to the elimination of habitat for *G. n.* ssp. *coloradensis.*

Regarding the third part of the comment, grazing management, the WEA outlines a method through which the landowner and the Service can work together to evaluate how rangeland production (according to NRCS standard methodology and guidelines, 2001), livestock grazing intensity and timing, and the maintenance of suitable habitat for *G. n.* ssp. *coloradensis* affect each other. On an annual basis, the Service and the landowner have an opportunity to evaluate these interacting factors, take into consideration the individual needs of the landowner and the conservation needs of the plant, and go forward with a mutually-agreed upon plan for the next year. Thus, through cooperation and coordination between each landowner and the Service annually, the needs of both parties are met through this mutually participatory agreement.

As stated above in Comment 6 (Peer), the WEA provides a unique approach to protecting the conservation needs of *G. n.* ssp. *coloradensis* above and beyond that afforded by designation of critical habitat. Importantly, these voluntary agreements are based on mutual coordination and participation between the individual landowners and the Service. They provide a mechanism to meet the needs of both parties involved, with flexibility to manage adaptively each year as conditions on the ground may change, with little or no expense to the landowner (see ''Exclusions Under Section 4(b)(2) of the Act'' section for a more detailed discussion).

Public Comments

We reviewed all comments received for substantive issues and new data regarding critical habitat and *G. n.* ssp. *coloradensis,* the draft economic analysis, and the draft EA. In the following summary of issues we address comments received on all documents during the public comment periods. Comments of a similar nature are grouped into issues.

Comment 10: The Wyoming Stockgrowers Association (WSA) provided strong support for the use of Wildlife Extension Agreements as key to conservation of *G. n.* ssp. *coloradensis* on private lands. However, they noted that time constraints associated with critical habitat designation prohibited what would have been a greater success since more landowners would have participated if time had permitted. WSA suggested that the final designation of critical habitat for *G. n.* ssp. *coloradensis* include a provision allowing for development of future WEAs and the concomitant removal of critical habitat for those lands.

Our Response: The Service acknowledges that time constraints may have been a significant factor limiting the number of agreements with landowners. Modifying the final critical habitat for a federally listed species would require a revised rulemaking. While such revisions are not typical, the Service would consider a revision if a significant number of landowners are willing to participate in agreements.

Comment 11: The WSA also identified two concerns associated with the economic analysis—(1) For those ranchers who enter into WEAs, indirect costs that were not examined include reduced hay production and/or weight gain of livestock associated with land management changes; and (2) for those landowners whose property receive the critical habitat designation, there is no analysis of lost opportunity costs resulting from their inability to participate in a number of Federal programs that provide expertise and dollars for resource improvement. The need for section 7 consultation will tend to discourage participation in these programs even in those cases where critical habitat is not a direct impediment to participation.

Our Response: Indirect costs to ranches entering into WEAs were examined. The comment correctly identifies the two potential avenues for weight loss, one related to haying activities and the other to grazing activities, both of which were included in the economic analysis. As described in Section 4.2.1.2 of that document, both quality and quantity losses in hay production are quantified. As for grazing, the economic analysis assumes the impacts on weight gain from excluding grazing on 0.08 ha (0.2 ac) during the period *G. n.* ssp. *coloradensis* produced and set seed are negligible. The enclosure could be grazed in May without any loss in nutritional value. The regrowth could then be grazed in September following the exclusion period, but the impact of the reduced weight gain from the regrowth should have a negligible impact on the overall weight gain of the livestock being grazed as it represents a minimal amount of forage. During the 3 months when grazing is not allowed in the enclosure, the analysis assumes that grazing could occur in the surrounding pasture.

Regarding the second part of the comment, while this may be an issue for some individual landowners, overall use of operational and conservation funding within the region is not expected to change as a result of the designation. As detailed in Section 4.1 of the economic analysis, the NRCS has not consulted with the Service in the past for *G. n.* ssp. *coloradensis.* Furthermore, as discussed in Section 4.2.1, the agency expects future demand for its programs in the southeastern portion of Wyoming (Laramie and Platte County) will continue to be light and that future consultations with the Service for *G. n.* ssp. *coloradensis* are unlikely. The NRCS also does not anticipate changes in conservation program participation due to *G. n.* ssp. *neomexicana.*

Comment 12: One commenter expressed confusion over having received several different drafts of the WEA, with a primary concern of the Service's ability to enter property covered by an agreement to look for other federally-listed species.

Our Response: In an effort to address landowners concerns during early WEA development stages, the Service made several revisions to the draft agreement and provided copies to all interested landowners. As explicitly stated in the WEAs, the sole purpose of these agreements was for the Service and the landowner to work cooperatively to provide protection for *G. n.* ssp. *coloradensis.* The WEA explicitly states that the Service must coordinate a date and time for annual monitoring with the landowner in question. Further, an offer was made to several landowners to allow the landowner, or a representative of Wyoming (*e.g.*, Department of Agriculture), to accompany Service personnel during each field visit in order to provide assurance that the Service was carrying out only those monitoring activities as agreed to within the WEA. The Service worked diligently to negotiate in good faith the specific terms of the agreement with all of the landowners.

Comment 13: A landowner questioned the long-term validity of ''special management considerations'' found in WEAs, and the possibility that environmental groups may sue in the future to change land management taking place on the landowner's private property.

Our Response: The WEAs are based on measurable and repeatable monitoring criteria using sound scientific principles and methods to evaluate habitat management success. These methods have been adopted and used widely by the NRCS and other agencies for many years (NRCS 2001). The scientific foundation of these agreements is solid and defensible (*see* ''Exclusions Under Section 4(b)(2) of the Act'' section for a more detailed discussion). In addition, there is nothing in the critical habitat provisions of the ESA that could mandate changes to or control of private actions on private property. Critical habitat designations affect only Federally conducted, funded, or permitted actions.

Comment 14: One landowner expressed concern that ''the Act seems to have turned into a single agency that seems to want an end to entire lifestyles and industries while not using common sense in designation.''

Our Response: We believe that our approach to this critical habitat designation is a common sense approach that provides many opportunities for the landowner and the Service to work cooperatively to protect this species in a manner that is economically viable to the individual landowners. The Service has reduced the proposed designation by 1,038 ha (2,564 ac) along 59 stream km (37 mi) based on the development of Wildlife Extension Agreements alone, and by 964 ha (2,384 ac) along approximately 41 km (25 mi) of stream based on surveys conducted this year that showed that primary constituent elements were not present. We agree that many landowners are excellent stewards of their lands and provide benefits to fish, wildlife, plants and their habitats, and we look forward to continuing to work with landowners in the future (see ''Exclusions Under Section 4(b)(2) of the Act'' section as well as our Response to Comment 19).

Comment 15: One landowner expressed strong support for using Wildlife Extensions Agreements to protect *G. n.* ssp. *coloradensis* and its habitat on private lands instead of critical habitat. In this landowner's view, there is no doubt that greater benefit is afforded to the species by protecting occupied lands with WEAs rather than designating those lands as critical habitat. This landowner further states that given that the majority of known *G. n.* ssp. *coloradensis* populations occur on private land, and that critical habitat will not change land management on these lands, therefore designating critical habitat on private land is of no benefit to the plant.

In contrast, one comment, representing the views of four different environmental groups, strongly opposed using Wildlife Extension Agreements instead of designating critical habitat. The groups state that such voluntary agreements as WEAs, which expire after 15 years, cannot be considered adequate mechanisms to exclude critical habitat. They claim that there is no evidence that, such agreements meet the Service's own criteria needed for such a conservation/management plan to provide adequate management protection; the agreements will increase *G. n.* ssp. *coloradensis* population sizes or restore its habitat; funding will be secured to implement such agreements; biological goals are central to the agreements; or the 15-year time span will be sufficient to realize goals. They state that exempting any populations from designation of critical habitat makes no sense biologically because the Service has stated that all proposed units are necessary to account for demographic uncertainty, low genetic variation, and limited opportunity to colonize new habitats. They conclude by stating that they support such agreements in addition to (not in place of) critical habitat, and suggest that the high level of landowner participation in *G. n.* ssp. *coloradensis* conservation by allowing the Service to conduct surveys during the summer of 2004 indicates a willingness of landowners to continue to do so in the future.

Our Response: We believe that the WEAs provide benefits to this species that outweigh the benefits of designating critical habitat (see ''Exclusions Under Section 4(b)(2) of the Act'' section for a more detailed discussion).

Comment 16: One commenter disagreed with the Service using historical records and extrapolations thereof for designating critical habitat rather than recent field surveys.

Our Response: The Service must use the best scientific and commercial data available for such designations. Because we agree with the comment that recent data should be used, the Service conducted field surveys during the summer of 2004 in order to update its records on which to base the final critical habitat designation. After conducting these surveys and updating records on presence of PCEs, suitable habitat, and species occurrence, the Service eliminated 964 ha (2,384 ac) along 41 km (25 mi) of stream from the final critical habitat designation. These are in addition to the 1,038 ha (2,564 ac), along 59 km (37 mi) of stream, eliminated due to WEAs.

Comment 17: One landowner requested to be dropped from critical habitat based on the following reasoning. The proposed rule states that ''critical habitat identifies specific areas, both occupied and unoccupied, that are essential to the conservation of a listed species that may require special management consideration and protection. Occupied habitat may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species.'' The landowner claimed that because special management was not necessary on the private property in question, the property should not be included in critical habitat.

Our Response: During discussions with the commenting landowner, the Service stated that the current management in terms of livestock grazing and hay production appeared to be meeting the conservation needs of *G. n.* ssp. *coloradensis* as evidenced by the presence of thousands of plants and many subpopulations. Indeed, the habitat appeared to meet the needs of the species based on surveys conducted during 2004. By acknowledging that the private property in question is providing for the conservation needs of *G. n.* ssp. *coloradensis* and that no changes are needed at this time, we are stating that the current management

provides the special management and protection that critical habitat requires. Therefore, without an agreement to guarantee that this special management and protection will continue (*i.e.*, a WEA), this management and protection could disappear. Therefore, we commend the landowner on the excellent land stewardship currently in place that provides for the conservation needs of this species, but must note that the statutory considerations for special management apply to the future as well as the present.

Comment 18: One comment, representing four environmental organizations, expressed concern that the environmental organizations were not provided a report of the 2004 surveys conducted by the Service. They stated that, consequently, they could not evaluate the adequacy of the proposed critical habitat.

Our Response: The ''report'' requested by the commenters has not yet been completed. Early drafts of the report did exist during the open comment period, but we determined that it was neither necessary nor appropriate to make the text of the drafts to be available to the commenters as it was not complete. Instead, we made a summary of the data collected in 2004 available to the public during the open comment period, and we provided that data to these commenters well before the close of the comment period. We did not rely on the draft report in making our final determination of critical habitat for *G. n.* spp. *coloradensis*, but we did rely on the data that was released to commenters.

Comment 19: While the Service discusses the importance of maintaining connectivity within and between populations to facilitate pollen flow and population expansion, it excludes the importance of seed dispersal and the importance of protecting habitat downstream of known populations where new populations could be established. Similarly, the commenter suggests that the Service must expand its designation to include other stream reaches with PCEs for recovery habitat, and that the Service has not taken into consideration range contraction of the species. The Service cannot seek to maintain the status quo by only protecting existing populations if recovery is its true goal.

Our Response: Although the Service did not explicitly state the importance of seed dispersal, it is implied in our statement regarding ''population expansion'' on page 47837 of the proposed rule (69 FR 47834). Population expansion cannot occur without seed dispersal for a sexually reproducing plant such as *G. n.* ssp. *coloradensis*, which does not produce rhizomes (underground stems) or stolons (above ground stems). Additionally, we believe that for a plant characterized by a very short distance of seed dispersal (typically less than 1 m for this species), pollen flow should be emphasized as a primary mechanism of gene flow and concomitant increase in genetic variation.

Regarding the need for expansion of the critical habitat designation, a substantial effort was made to provide for linkage of individual subpopulations and provide for colonization downstream via seed dispersal to aid in species recovery (please see response Comment 1 (Peer)). As evidenced throughout the description in the proposed rule of several of the units, the Service has protected suitable habitat between, and downstream from, known subpopulations based on the best available scientific information. Habitat that does not contain PCEs was eliminated as it is not essential for the conservation of this species. The Service believes that the current extent of contiguous critical habitat, in addition to habitat protected by WEAs, provides for the conservation needs of the species to colonize new habitats and expand populations, and provides for recovery needs of the species. Therefore, there is no need to consider repatriation to the entire historic range. However, the Service acknowledges that recovery planning may indicate a need for additional habitat.

Comment 20: The Service acknowledges the importance of flooding and scouring events to the ecology of the *G. n.* ssp. *coloradensis*, but does not adequately attempt to protect and restore these important ecological processes, and the economic analysis does not address the costs and benefits of maintaining instream flows and preventing water diversions. The Service must do all that it can to retain flooding and scouring events in suitable habitat for the *G. n.* ssp. *coloradensis* or to achieve recovery.

Our Response: We agree that it is important to do all that we can to retain flooding and scouring events in suitable habitat for the plant. During the development of the proposed rule, we spent a considerable amount of time examining maps and field conditions in areas that may provide natural hydrological patterns for *G. n.* ssp. *coloradensis*, but we were not able to identify any such areas. As discussed in the economic analysis, Section 4.2.5, where a Federal nexus exists, costs related to water diversions, and in the case of this economic analysis, costs related to water diversion activities are not expected.

However, discussions with several landowners revealed that natural processes such as flood events continue to provide some flooding and scouring events needed for colonization of *G. n.* ssp. *coloradensis*. For example, at least five different landowners described at least one significant flood event that occurred over the past ten years that was responsible for scouring out habitat for plants with a colonizing habit—three of whom believe that such an event was responsible for at least one subpopulation of *G. n.* ssp. *coloradensis* located on their property today that was previously undiscovered during surveys. As the Service continues to work with landowners while implementing WEAs over the next several years, we will continue to explore opportunities to enhance, restore, and conserve hydrological regimes.

Comment 21: On page 8 of the economic analysis, the Service acknowledges that overgrazing may threaten the *G. n.* ssp. *coloradensis*. However, page 4–11 of the economic analysis implies that the timing, not the intensity, of livestock grazing impacts the species.

Our Response: We agree that while grazing can be an important land management tool, overgrazing can detrimentally affect the plant. As discussed in Section 4.2.1.1 of the economic analysis, the timing of grazing, regardless of intensity, is potentially dangerous to the plant if it occurs during the flowering and seed setting in July and August. Consequently, the economic analysis quantifies the impacts to ranchers from excluding the core subpopulation from all grazing from late May until August and captures the economic impacts of this exclusion. The economic impacts would not vary by grazing intensity since the costs are based on the quantity of forage produced by the excluded area.

As noted in comments provided by two peer reviewers knowledgeable about the ecological requirements of *G. n.* ssp. *coloradensis* (see Comment 7 (Peer)), grazing may be an important tool for maintaining open habitat for this species. There is a growing body of evidence documenting the importance of decreasing the level of competition with other plants to maintain suitable (*i.e.*, more open and less over-grown) habitat for *G. n.* ssp. *coloradensis* (Munk *et al.* 2002, Burgess 2003, Heidel 2004a and 2004b).

Comment 22: One commenter stated that the Service had information about potential populations in the vicinity of

the designation yet outside of the area inventoried, yet the Service made no attempt to verify these reports. Similarly, the Service should check herbaria records in addition to CNHP and WNDD records to document known locations of *G. n.* ssp. *coloradensis*.

Our Response: The Service sought out and used the best available information for this designation. We worked hard to contact landowners to gain access to historical areas, hired a full-time professional botanist to survey over 90 mi (145 km) of primarily private lands during the summer of 2004, and updated museum and database records. We were able to gain access on approximately 80 percent of these locations. While the Service has an obligation to follow up on potential occurrences provided by various sources (*e.g.*, informal reports, credible leads from other field botanists), we need the permission of the landowner owner to access lands. Therefore, while in some cases we had reason to believe that private lands adjacent to surveyed areas may have been occupied by the plant, unless permission was granted by the landowners, we did not survey the land. However, if the presence of plants on that property was previously verified, yet access was not allowed to update those surveys, we assumed presence and these areas were included in this designation. We believe that all available and pertinent information concerning locations for the species was confirmed and pertinent information was included in this designation to the extent possible.

Comment 23: We are unsure why the Service would have eliminated areas that did not contain the appropriate vegetation or associated native plant species as indicated on page 47838 of the proposed rule (69 FR 47834).

Our Response: The Service eliminated areas based on observations, surveys, and recommendations of a professional botanist. Those areas referred to by the commenter were typically characterized by exclusively upland species that would never be observed in the same habitat as *G. n.* ssp. *coloradensis* (*e.g.*, *Kochia scoparia*). If the PCEs were present, then the Service considered the habitat was suitable for *G. n.* ssp. *coloradensis*.

Comment 24: The proposed rule states that critical habitat provides little additional protection to most species while consuming significant amounts of conservation resources was viewed as incorrect and inappropriate. The comment states that critical habitat does provide protections beyond those conveyed under other parts of the Act, and that the Center for Biological Research has used the Service's own data to show that listed species with critical habitat are less likely to be declining and over twice as likely to be recovering as listed species without critical habitat. The commenter notes that 2004 surveys and concomitant information collected regarding the conservation needs of the species would not have occurred without the need to designate critical habitat. The commenter further states that while the Service explains the accelerated schedules of court-ordered designations and the cost of publishing the designations, the Service had four years to complete this designation but did not begin work until March 2004.

Our Response: See Response to Comment 5.

Comment 25: The preferred alternative of the Environmental Assessment fails to provide for recovery of *G. n.* ssp. *coloradensis*. The Service proposes that conservation actions will be limited to only a subset of occupied habitat in which concentrated subpopulations of the plant are found. The statement in the Environmental Analysis that special management of WEAs will focus on the core of the concentrated subpopulations, the average size of which is 15 by 15 m (50 by 50 ft), contradicts the Service's assessment regarding the importance of future opportunities for colonization events for metapopulation persistence and species viability.

Our Response: The areas encompassed in the WEAs were based on the same areas that would have been designated as critical habitat at those locations. That is, the agreements protect the same areas that critical habitat would have protected but for the WEAs. This is consistent with the Service's position regarding the need to protect long-term metapopulation persistence and species viability by protecting as many populations as possible through conservation—either through critical habitat or WEAs.

We made a substantial effort to provide for linkage of individual subpopulations and provide for colonization downstream via seed dispersal to aid in species recovery. The Service believes that the current extent of contiguous critical habitat, in addition to habitat protected by WEAs, provides for the conservation needs of the species to colonize new habitats and expand populations, and provides for recovery needs of the species (also *see* Responses to Comment 1 and 19).

Eleven WEAs protect a total area encompassing 1,038 ha (2,564 ac) along 59 km (37 mi) of stream. This gives an average of 94 ha (233 ac) and 5.4 km (3.4 mi) of stream for each WEA. Within this average of 94 ha (233 ac) per WEA, there may be three or four subpopulations with an average size of 15 m^2 (50 ft^2) (this average is based on actual sizes of populations observed in the field). While all 94 ha (233 ac) are included in the WEA, there may be a need to conduct special management actions on only one or two of these core subpopulations. For example, the WEA encompassed a total of 16 ha (40 ac) of habitat for *G. n.* ssp. *coloradensis*, yet the special management—which involved building a fence around the core subpopulation of plants because no other way could be found to protect it, encompassed an area of only 11 m by 17 m (35 ft by 55 ft). By acknowledging that private property in question is providing for the conservation needs of *G. n.* ssp. *coloradensis* and that no changes are needed at this time, we are stating that the current management being implemented by the landowner is providing the special management and protection that critical habitat requires (*see* Response to Comment 6). Therefore, it is typically not necessary to undertake additional special management on all acreage covered within the WEAs, only for those smaller areas still in need of additional protection.

Comment 26: The economic analysis presents a table of listed species that were included in previous consultations concerning *G. n.* ssp. *coloradensis*. The commenter asks us to clarify whether or not other listed species such as the peregrine falcon can be found in the proposed area.

Our Response: The Service has conducted past consultations on *G. n.* ssp. *coloradensis* in combination with numerous species, as indicated in the DEA, Exhibit 2–3 was listed. The peregrine falcon was removed from this table, and the final economic analysis reflects the removal of the peregrine falcon from this table.

Comment 27: Some costs ($32/hour for the labor to repair fences, $3,500 to provide a species list to Wyoming Department of Transportation, $1,000 for a ''no effect'' concurrence letter) seem inflated.

Our Response: We acknowledge that a rancher may perform fence maintenance activities themselves, but we consider the regional custom rate for fence repair to be an approximation of the rancher's opportunity cost of performing fence maintenance activities. If agricultural operators do not own the machinery and equipment necessary to perform every farm and ranch operation, farmers and ranchers may need to hire custom operators to perform the activities. The

economic analysis is based on the assumption that the ranchers will hire a custom operator to perform annual fence maintenance. Rates for hiring others to perform work normally include the costs of owning equipment and performing the custom operation. The hourly rate used in the economic analysis for fence repair is a regional specific rate based on a survey of Wyoming custom operators, farmers, ranchers, and agribusiness personnel conducted by the University of Wyoming in 2002. As for administrative costs of section 7 consultation, these costs are based on a sample of consultation records from several Service field offices around the country as described in Exhibit 4–1 of the economic analysis.

Comment 28: The economic analysis needs to clarify and reconcile the pipeline projects described in the report and state whether routes have been finalized. If they have not been finalized, explain that the impacts of the pipeline are uncertain at this time.

Our Response: A representative of the company installing the pipeline reviewed a map of the proposed designation and stated that the pipeline project is not expected to impact known plant populations. Section 4.2.2 of the economic analysis was modified to eliminate the confusion.

Comment 29: A landowner who has since entered into a WEA explained that a road widening project adjacent to his property threatened *G. n.* ssp. *coloradensis* habitat, but it appears that this is not mentioned in the Road/Bridge section of the economic analysis.

Our Response: The area in question is the route 149 bridge crossing Lodgepole Creek, north of Burns, Wyoming. We contacted the Public Works Department of Laramie County, Wyoming, and they indicated there is no planned work along this section of road. Section 4.2.4.2 of the final economic analysis has been updated to incorporate this new information.

Comment 30: One commenter questioned why the draft economic analysis did not consider the potential economic benefits associated with the designation of critical habitat for the *G. n.* ssp. *coloradensis*.

Our Response: The draft economic analysis, 1.2.4, Benefits section, states ''Given the limitations associated with estimating the benefits of proposed critical habitat designation for *G. n.* ssp. *coloradensis*, the Service believes that the benefits of proposed critical habitat designation are best expressed in biological terms that can be weighed against the expected costs impacts of the rulemaking.'' The development of quantitative estimates associated with the benefits of critical habitat is impeded by the lack of available studies and information relating to the size and value of beneficial changes that are likely to occur as a result of listing a species or designating critical habitat.

This analysis is used for helping the Service decide whether to exclude areas and whether the exclusions outweigh the benefits of inclusion. So, the economic analysis looks at the burden on the public of the regulation, and whether any areas have a disproportionate burden. The Service must then balance that against the benefits of including that area, including the benefits of the area to the species and the benefits of the species' existence and recovery, to the extent these are provided by the critical habitat designation. This analysis is included in the 4(b)(2) discussion in the rules. We believe that monetizing may trivialize the benefits of critical habitat because there are no widely accepted ways for placing a dollar value on a biological benefit. In this analysis, several categories of benefits were identified, including preservation of open space and biodiversity, both of which can be associated with species conservation.

Summary of Changes From the Proposed Rule

In preparing our final designation of critical habitat for *Gaura neomexicana* ssp. *coloradensis*, we reviewed comments received on the proposed designation of critical habitat, and we made the following changes to our proposed designation:

(1) We made revisions based on 2004 surveys conducted this year to update our data on the species. We refined the final critical habitat designation and eliminated 964 ha (2,384 ac) along approximately 41 km (25 mi) of stream. Five units (Unit 2, Bear Creek East; Unit 4, Little Bear Creek/Horse Creek; Unit 5, Lodgepole Creek West; Unit 6, Lodgepole Creek East; and Unit 7, Borie) were reduced based on new 2004 information provided by habitat evaluations (*see* Critical Habitat Designation section).

(2) Under section 4(b)(2) of the Act, we excluded areas with Wildlife Extension Agreements (WEAs) which provide for conservation of *G. n.* ssp. *coloradensis* and its habitat. Specifically, we excluded 1,038 ha (2,564 ac) along 59 km (37 mi) of stream, a total of 30 percent of the proposed designation, in portions of Unit 4 (Little Bear Creek/Horse Creek), Unit 5 (Lodgepole Creek West), Unit 6 (Lodgepole Creek East), and Unit 7 (Borie), as well as the entire Unit 8 (Meadow Springs Ranch) based on development of WEAs. Collectively, we excluded a total of 1,808 ha (4,468 ac, 53%) of private lands and a total of 194 ha (480 ac, 6%) of lands owned by city municipalities from this final critical habitat designation based on updated surveys conducted in 2004 and development of WEAs (for a more information about the WEAs with landowners, see ''Exclusions Under Section 4(b)(2) of the Act'' section).

(3) Habitat supporting *G. n.* ssp. *coloradensis* populations located on the WAFB was not considered for proposed designation as critical habitat. The WAFB has an approved INRMP that provides a benefit to the species. Also, we did not include historical locations in Boulder, Douglas, and Larimer Counties in Colorado, because these areas did not contain the PCEs.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) The specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species (Primary Constituent Elements, or PCEs) and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat.

To be included in a critical habitat designation, the habitat must first either be occupied at the time of listing with PCEs in need of special management or protection, or be unoccupied habitat that is, of itself, ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific and commercial data available, occupied habitat areas that provide essential life-cycle needs of the species

(*i.e.*, areas on which are found the PCEs, as defined at 50 CFR 424.12(b)).

Occupied habitat may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).)

Our regulations state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species'' (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards under the Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

Critical habitat designations do not signal that habitat outside the designation is unimportant to *G. n.* ssp. *coloradensis.* Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1), and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods and Criteria

For more information, please refer to the proposed critical habitat rule (August 6, 2004, 69 FR 47834).

Criteria Used To Identify Critical Habitat

In our delineation of the critical habitat units, we selected areas to provide for the conservation of *G. n.* ssp. *coloradensis* at seven sites where previously known subpopulations occur. Much of what is known about the specific physical and biological requirements of *G. n.* ssp. *coloradensis* is described in the Primary Constituent Elements section.

The Service worked with the WSA, the Wyoming Association of Conservation Districts, the WDA, the NRCS in Wyoming and Nebraska, the City of Fort Collins in Colorado, the City of Cheyenne in Wyoming, and several individual landowners to develop Wildlife Extension Agreements (WEAs) to provide for the conservation of *G. n.* ssp. *coloradensis.* These WEAs include specific on-the-ground actions to alleviate specific threats, such as: allowing the Service access to private land to conduct annual monitoring of *G. n.* ssp. *coloradensis* populations to evaluate success of management actions under the agreement; establishing an adaptive management approach to evaluate success of management actions under the agreement; and facilitating the collection of data needed for future recovery of the species. WEAs provide specific measures to address potential threats due to herbicide application, livestock grazing, and hay production. Through cooperation and communication between landowners and the Service, such WEAs provide for the conservation needs of *G. n.* ssp. *coloradensis* above and beyond what would be achievable through the designation of critical habitat on private lands while meeting the needs of individual landowners. Working cooperatively with private landowners to protect habitat for *G. n.* ssp. *coloradensis* through WEAs is the Service's preferred approach to protecting the species on private lands. The Service has pursued such agreements to the fullest extent practicable prior to finalizing critical habitat. In several locations throughout the species' known range of occurrence, the Service has determined that the benefits of excluding an area from critical habitat designation subject to one of these agreements outweigh the benefits of including it in the final critical habitat designation. Currently, 11 such agreements are in place. Accordingly, the Service has excluded 1,038 ha (2,564 ac) along 59 km (37 mi) of stream from final critical habitat designation pursuant to section 4(b)(2) of the Act.

The Service has worked with landowners to gain access to private lands to survey for plant populations. Most of these populations had not been surveyed since 1998, earlier in some cases. Field surveys were conducted during the summer of 2004 within 80 percent of all habitat previously known to be occupied by *G. n.* ssp. *coloradensis.*

Reproductively mature *G. n.* ssp. *coloradensis* plants were found on 35 of the previously known subpopulation locations, or approximately 60 percent; 24 new subpopulations also were identified, in addition to many scattered individual plants between subpopulations. Based on information provided by these surveys, the Service has further refined the critical habitat designation from the original proposal.

We designate critical habitat on lands on which the PCEs are found. While the species was known historically from several additional locations in northern Colorado and southeastern Wyoming, these populations are believed to be extirpated (Fertig 1994) and are not included in the designation.

Much of the survey data on which this designation is based represents the number of flowering individuals during one point in time. Because of the annual fluctuation in population size for this species (ranging from 200 percent), and because the number of flowering individuals each year depends upon local environmental factors that vary substantially year to year (*e.g.*, precipitation), it is likely that other individual plants and subpopulations exist but were not identified during previous, or 2004, surveys. This is particularly true for those areas containing the PCEs for the species that occur between subpopulations. Not only are these areas essential to achieving the long-term conservation goal of protecting the maximum number of populations possible, but they are essential in maintaining gene flow between populations via pollen flow to maintain, and potentially increase, local population genetic variation.

In our delineation of the critical habitat units, we selected areas to provide for the conservation of *G. n.* ssp. *coloradensis* in all areas where it is known to occur, except WAFB (see discussion in ''Exclusions From Critical Habitat, Lands Under U.S. Air Force Jurisdiction'' section) and those areas for which WEAs have been secured. All units are essential because *G. n.* ssp.

coloradensis populations exhibit significant demographic uncertainty, contain very low genetic variation, and have very little opportunity to colonize new geographic areas with which to balance local extinction events. We believe the designation is of sufficient size to maintain ecological processes and to minimize secondary impacts resulting from human activities and land management practices occurring in adjacent areas. We mapped the units with a degree of precision commensurate with the available information and resources.

Although we are not designating sites other than where populations are known to occur, we do not mean to imply that habitat outside the designation is unimportant or may not be required for recovery of the species. Areas that support newly discovered populations in the future, but are outside the critical habitat designation, will continue to be subject to the applicable prohibitions of section 9 of the Act and the regulatory protections afforded by the section 7(a)(2) jeopardy standard. In addition, for such populations discovered on private lands, the Service will consider entering into conservation agreements with the landowners similar to the ones contemplated for currently known populations.

We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed Implementation Agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. There are no HCPs in place for *Gaura neomexicana* ssp. *coloradensis* at this time. Department of Defense lands with an approved INRMP also are excluded from critical habitat. We have approved the INRMP for WAFB, which provides a benefit to *G. n.* ssp. *coloradensis.* Consequently, we did not consider habitat supporting populations located on WAFB for designation as critical habitat.

Designating critical habitat is one mechanism for providing habitat protection for *G. n.* ssp. *coloradensis* populations. However, the benefits of protecting extant populations through conservation agreements, by partnering with private landowners on whose property populations occur, outweigh the benefits of designating critical habitat for this species. Greater protection results from conservation agreements that restrict specific types of actions (*e.g.,* indiscriminate application of herbicides; overgrazing; timing of hay cutting) undertaken by private landowners that may adversely impact *G. n.* ssp. *coloradensis* or its habitat and that would not involve a Federal nexus subject to consultation under section 7(a)(2) of the Act. The designation of critical habitat, in and of itself, does not provide similar restrictions. A review of the complete consultation history of *G. n.* ssp. *coloradensis* has revealed that none of the actions undertaken on private lands resulting in these threats to the species have ever required consultation under the Act. In addition, there is no mechanism in the critical habitat provisions of the ESA to either promote voluntary active conservation measures or to require them.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (PCEs) that are essential to the conservation of the species, and that may require special management considerations and protection. These include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The PCEs for *Gaura neomexicana* ssp. *coloradensis* include those habitat components essential for the biological needs of rosette growth and development, flower production, pollination, seed set and fruit production, and genetic exchange. *G. n.* ssp. *coloradensis* typically lives and reproduces on subirrigated, stream-deposited soils on level or slightly sloping floodplains and drainage bottoms at elevations of 1,524 to 1,951 m (5,000 to 6,400 ft). Most colonies are found in low depressions or along bends in wide, active, meandering stream channels a short distance upslope of the active channel, and may occur at the base of alluvial ridges at the interface between riparian meadows and drier grasslands (Fertig 2001). Average annual precipitation within its range is 33 to 41 cm (13 to 16 in), primarily in the form of rainfall (Fertig 2000). Soils in *G. n.* ssp. *coloradensis* habitat are derived from conglomerates, sandstones, and tufaceous mudstones and siltstones (*i.e.,* derived from spongy, porous limestone formed by the precipitation of calcite from the water of streams and springs) of the Tertiary White River, Arikaree, and Ogallala formations (Fertig 2000).

Ecological processes that create and maintain *G. n.* ssp. *coloradensis* habitat are important PCEs. Essential habitat components to *G. n.* ssp. *coloradensis* occur in areas where past and present hydrological and geological processes have created streams, floodplains, and conditions supporting favorable plant communities. Historically, *G. n.* ssp. *coloradensis* habitat has been maintained along streams by natural flooding cycles that periodically scour riparian vegetation, rework stream channels and floodplains, and redistribute sediments to create vegetation patterns favorable to *G. n.* ssp. *coloradensis. G. n.* ssp. *coloradensis* commonly occurs in communities including *Agrostis stolonifera* (redtop) and *Poa pratensis* (Kentucky bluegrass) on wetter sites, or *Glycyrrhiza lepidota* (wild licorice), *Cirsium flodmanii* (Flodman's thistle), *Grindelia squarrosa* (curlytop gumweed), and *Equisetum laevigatum* (smooth scouring rush) on drier sites (Fertig 1994). Both of these habitat types are usually intermediate in moisture between wet, streamside communities dominated by *Carex spp.* (sedges), *Juncus spp.* (rushes), and *Typha spp.* (cattails), and dry upland shortgrass prairie. Where hydrological flows are controlled to preclude a natural pattern of habitat development, and other forms of disturbance are curtailed or eliminated, a less favorable mature successional stage of vegetation will develop, resulting in the loss of many of these plant associates.

Hydrological processes, and their importance in maintaining the moisture regime of habitat preferred by *G. n.* ssp. *coloradensis,* also have an important direct effect on seed germination and seedling recruitment. Analysis by Heidel (2004a) demonstrated a significant positive correlation between census number and net growing season precipitation 2 years prior to census. Important direct effects of moisture on *G. n.* ssp. *coloradensis* establishment and recruitment also have been demonstrated by the appearance of high numbers of new vegetative plants within 27 days after a 100-year flood event at WAFB on August 1, 1985 (Rocky Mountain Heritage Task Force 1987 cited in Heidel 2004a).

The long-term availability of favorable *G. n.* ssp. *coloradensis* habitat also depends on impacts of drought, fires, windstorms, herbivory, and other natural events. *G. n.* ssp. *coloradensis*

requires open, early- to mid-succession riparian habitat experiencing periodic disturbance. While non-natural disturbance (*e.g.,* road construction, housing development) may encourage establishment of noxious weeds, periodic disturbance is necessary to control competing vegetation, and to create open, bare ground for seedling establishment (Fertig 2001). *Salix exigua* (coyote willow), Cirsium arvense (Canada thistle), and *Euphorbia esula* (leafy spurge) may become locally dominant in *G. n.* ssp. *coloradensis* habitat that is not periodically flooded or otherwise disturbed, resulting in decline of the species. Research has demonstrated negative impacts on *G. n.* ssp. *coloradensis* populations from competition with locally abundant noxious weeds, forbs, and grasses (Munk *et al.* 2002, Heidel 2004b).

Based on our knowledge to date, the PCEs for *Gaura neomexicana* ssp. *coloradensis* are:

(1) Subirrigated, alluvial soils on level or low-gradient floodplains and drainage bottoms at elevations of 1,524 to 1,951 m (5,000 to 6,400 ft).

(2) A mesic moisture regime, intermediate in moisture between wet, streamside communities dominated by sedges, rushes, and cattails, and dry upland shortgrass prairie.

(3) Early- to mid-succession riparian (streambank or riverbank) plant communities that are open and without dense or overgrown vegetation (including hayed fields that are disced every 5–10 year at a depth of 8–12 inches, grazed pasture, other agricultural lands that are not plowed or disced regularly, areas that have been restored after past aggregate extraction, areas supporting recreation trails, and urban/wildland interfaces).

(4) Hydrological and geological conditions that maintain stream channels, floodplains, floodplain benches, and wet meadows that support patterns of plant communities associated with *G. n.* ssp. *coloradensis.*

Existing features and structures within the boundaries of the mapped units, such as buildings, roads, parking lots, other paved areas, landscaped areas, regularly plowed or disced agricultural areas, and other features not containing any of the PCEs are not critical habitat.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas on which the PCEs are found and which may require special management considerations or protections. For *G. n.* ssp. *coloradensis,* special management considerations include maintaining existing management regimes that produce surface or subsurface water flows that provide the essential hydrological regime that supports the species (PCEs 1, 2, and 4); appropriate application of herbicides used to control noxious weeds (PCE 3); and preventing harmful habitat fragmentation from residential and urban development that detrimentally affects plant-pollinator interactions, local hydrologic patterns and moisture regimes, leads to a decline in species reproduction, and increases susceptibility to overgrowth by non-native plant species (PCEs 1, 2, 3, and 4). While excessive grazing can lead to changes in essential habitat conditions (*e.g.,* increases in soil temperature resulting in loss of moisture, decreases in plant cover, and increases in non-native species), managing for appropriate levels of grazing provides an important management tool with which to maintain open habitat needed by the species (PCEs 2 and 3).

Critical Habitat Designation

We are designating seven units as critical habitat for *G. n.* ssp. *coloradensis.* The critical habitat areas described below constitute our best assessment at this time of the areas essential for the conservation of *G. n.* ssp. *coloradensis.* The units are—(1) Tepee Ring Creek in Wyoming; (2) Bear Creek East in Wyoming; (3) Bear Creek West in Wyoming; (4) Little Bear Creek/Horse Creek in Wyoming; (5) Lodgepole Creek West in Wyoming; (6) Lodgepole Creek East in Wyoming; and (7) Borie in Wyoming.

The approximate area encompassed within each critical habitat unit is shown in Table 1.

TABLE 1.—FINAL CRITICAL HABITAT UNITS FOR GAURA NEOMEXICANA SSP. COLORADENSIS

Critical habitat unit	Proposed acres (hectares)	Final acres (hectares)	Percentage change from proposal
Unit 1: Tepee Ring Creek	107 (43)	107 (43)	0
Unit 2: Bear Creek East	801 (324)	358 (145)	55
Unit 3: Bear Creek West	500 (202)	500 (202)	0
Unit 4: Little Bear Creek/Horse Creek	2,480 (1,004)	807 (327)	67
Unit 5: Lodgepole Creek West	1,067 (432)	902 (365)	15
Unit 6: Lodgepole Creek East	1,683 (681)	378 (153)	78
Unit 7: Borie	1,141 (462)	486 (197)	57
Unit 8: Meadow Springs Ranch	707 (286)	0 (0)	100
Total	8,486 (3,434)	3,538 (1,432)	

The majority of the acreage occurs on privately owned land. We know of no Federal, tribal, or military lands within these boundaries. There is a small portion of land within Units 1, 2, 3, 4, 5, 6, and 7 that are owned by the State of Wyoming. We present brief descriptions of all units, and reasons why the PCEs essential for the conservation of *G. n.* ssp. *coloradensis* may be in need of special management or protection, below.

Unit 1: Tepee Ring Creek

Unit 1 consists of 43 ha (107 ac) along 2.4 km (1.5 mi) of Tepee Ring Creek in Platte County, Wyoming, and is under private ownership. One subpopulation of *G. n.* ssp. *coloradensis* has been found along Tepee Ring Creek in the lower SE corner of T21N R68W Section 2. Habitat is moist meadow along the stream. Habitat along this stream reach throughout this unit is primarily identified as PEMA (palustrine emergent temporarily flooded) wetland intermixed with PEMC (palustrine emergent seasonally flooded) wetland, according to National Wetlands Inventory terminology (Service 1993). It is likely that *G. n.* ssp. *coloradensis* occurs in Section 1 downstream of the subpopulation in Section 2, based on presence of PCEs but this area is not included in this unit. This unit contains areas which represent the northernmost extent of the subspecies' known range of occurrence. This unit is separated by approximately 40 km (25 linear mi)

from the closest population and provides conditions that are conducive to locally adaptive genetic variability not found in other populations. This unit may require special management for appropriate levels of grazing needed to maintain open habitat, and the application of herbicides used to control noxious weeds.

Unit 2: Bear Creek East

Unit 2 consists of 145 ha (358 ac) along 8 km (5 mi) of the South Fork of the Bear Creek and the Bear Creek in Laramie County, Wyoming. Surveys during 2004 revealed reproductively mature *G. n.* ssp. *coloradensis* plants in the South Fork of the Bear Creek from T19N67W Section 25, extending northeast to Section 17, and within T19N66W Section 11, bordering Section 12. This unit is primarily under private ownership. Habitat within this stream reach is primarily identified as PEMC intermixed with PEMA. Surveys during 2004 revealed that Section 36 on the southwestern end of the originally proposed unit, and Sections 16, 9, 10 and the eastern half of Section 12 contained no *G. n.* ssp. *coloradensis* plants and, that in some areas containing PCEs were not present. Therefore, these areas were removed from this unit. This unit has historically supported a number of *G. n.* ssp. *coloradensis* populations in a variety of habitat types, and is located at the furthest point downstream within the Bear Creek drainage. Disconnected from other population gene pools, conditions surrounding subpopulations within this area are conducive to locally adapted genotypes not found in other populations. Special management in this unit may require timing the cutting of hay with fruit and seed set of *G. n.* ssp. *coloradensis,* and for the application of herbicides used to control noxious weeds.

Unit 3: Bear Creek West

Unit 3 consists of three stream reaches encompassing a total of 202 ha (500 ac) along 11.7 km (7.3 mi) of stream within the Bear Creek drainage in Laramie County, Wyoming. This unit is primarily under private ownership, but includes some Wyoming State lands. This unit may require special management for appropriate levels of grazing needed to maintain open habitat, and the application of herbicides used to control noxious weeds.

Reach 1: Habitat within this reach is semi-moist meadows on flat benches and streambanks along an intermittent stream. Plants are most abundant in areas with low thistle density and heavily browsed willow, and are absent from adjacent, ungrazed areas with dense willow thickets (WNDD 2004). Several subpopulations of *G. n.* ssp. *coloradensis* were found during surveys of 2004 throughout this entire reach. This reach supports a large population with good reproduction and has good condition.

Reach 2: Habitat within this reach consists of hummocky banks of loamy clay soil and gravelly, sloping terraces in semi-moist, closely grazed *Poa pratensis* (Kentucky bluegrass)/*Elymus spp.* (wild rye) streamside meadow at the edge of dense *Carex aquatilis* (Nebraska sedge)/*Juncus balticus* (Baltic rush) community (WNDD 2004). Several subpopulations of *Gaura neomexicana* ssp. *coloradensis* were found during surveys of 2004 throughout this entire reach. This location represents the uppermost elevation within the species' known range of occurrence. Historically it has supported a large population located in habitat that contains few threats; conditions that remain present today.

Reach 3: Habitat within this reach consists of three types—(1) Seasonally wet *Juncus balticus*/*Agrostis stolonifera* (redtop)/*Poa pratensis* community on subirrigated gravelly-sandy soil in low depressions a distance from the current stream channel; (2) streambank terraces of dark-brown loamy clay in dense *Helianthus nuttallii* (Nuttall's sunflower)/*Solidago canadensis* (Canada goldenrod)/*Phleum pratense* (timothy) grass community; and (3) grassy terrace dominated by *Agrostis stolonifera, Poa pratensis, Elymus smithii* (wild rye), and *Melilotus albus* (white sweetclover) on brown clay-loam (WNDD 2004). Several subpopulations of *G. neomexicana* ssp. *coloradensis* were found during surveys of 2004 throughout this entire reach, including T18N R68W Section 21 and 22. There is a natural break in habitat approximately in the center of Section 21, at which point the PEMA habitat changes to scrub-shrub and continues upstream (to the southwest) through the remainder of Section 21. We did not designate critical habitat beyond this natural break.

Unit 4: Little Bear Creek/Horse Creek

Unit 4 consists of two stream reaches encompassing a total of 327 ha (807 ac) along 18.8 km (11.7 mi) of stream within the Little Bear Creek and Horse Creek drainages in Laramie County, Wyoming. This unit is primarily under private ownership, but includes some Wyoming State lands. This unit may require special management for appropriate levels of grazing needed to maintain open habitat in some areas; special management to maintain surface or subsurface water flows; and for the application of herbicides used to control noxious weeds.

Reach 1: Surveys conducted during 2004 found scattered individual plants and subpopulations of *G. n.* ssp. *coloradensis* throughout most of this reach. One or more PCEs were not present within the portions of this reach that the Service eliminated from the final critical habitat designation. Habitat throughout Little Bear Creek and the Paulson Branch stream reaches is primarily identified as PEMC intermixed with PEMA. This reach has supported a large number of subpopulations with a moderate-to-large number of plants over the years. Because this reach is reproductively isolated from any others, conditions surrounding resident subpopulations are conducive to locally adapted genetic variation important to future species persistence.

Reach 2: Surveys conducted during 2004 found many subpopulations and individual plants of *G. n.* ssp. *coloradensis* throughout most of the Horse Creek drainage originally proposed as critical habitat, including Brunyansky Draw. One or more of the PCEs was not present within the Horse Creek drainage west of Interstate 25; therefore, the Service eliminated this portion of the original proposal from the final critical habitat designation. With the exception of the far eastern portion of the originally proposed reach, the remainder of the proposed reach within Horse Creek was included in a WEA for the conservation of *G. n.* ssp. *coloradensis,* and was dropped from the final critical habitat designation. While the far eastern end of the proposed designation was not surveyed during 2004 (permission was not granted by the landowner), observations during 2004 surveys of adjacent land revealed the presence of PCEs and suitable habitat. This area is not included in a WEA, PCEs are present, many subpopulations were found during 2004 surveys on adjacent land, and the last surveys conducted in this area found *G. n.* ssp. *coloradensis,* this portion of the proposed critical habitat was included in the final designation. The Service did not designate critical habitat beyond the center of Section 10 on the east end of this reach because the PCEs are not present.

Unit 5: Lodgepole Creek West

Unit 5 consists of 365 ha (902 ac) along 20.4 km (12.7 mi) of Lodgepole Creek in Laramie County, Wyoming. This unit is primarily under private ownership, but includes some Wyoming

State lands. Subpopulations of *G. n.* ssp. *coloradensis* have been found along Lodgepole Creek from T16N 68W Section 24 on the western edge of this unit, extending 19 km (12 mi) of stream east to T15N R66W Section 3. Surveys conducted during 2004 revealed several subpopulations of *G. n.* ssp. *coloradensis* present throughout T16N R67W Sections 19 and 20. Access was denied for 2004 surveys throughout the remainder of the unit. We finalized a WEA with the landowner of Sections 19 and 20 because the areas did not contain the PCEs for *G. n.* ssp. *coloradensis.* Sections 19, 20, and 24 were removed from this unit.

Habitat throughout the designated critical habitat stream reach is primarily identified as PEMC intermixed with PEMA. This unit has supported a large number of small, and a few large, subpopulations over the years in a variety of habitat types and land management practices. The number of subpopulations within the variety of habitat may represent a number of locally selected genotypes existing under conditions not found elsewhere, providing an important contribution to the long-term conservation of the species. This unit may require special management for appropriate levels of grazing needed to maintain open habitat in some areas, and management for reduced levels of grazing in others; special management to maintain surface or subsurface water flows; and the application of herbicides used to control noxious weeds.

Unit 6: Lodgepole Creek East

Unit 6 consists of one stream reach encompassing a total of 153 ha (378 ac) along 8.4 km (5.2 mi) of Lodgepole Creek in Laramie County, Wyoming. This unit is primarily under private ownership with some Wyoming State lands.

The area is managed for livestock grazing and hay production, mowed late in the season and used for winter pasture. Previous surveys found subpopulations of *Gaura neomexicana* ssp. *coloradensis* along Lodgepole Creek from Thompson Reservoir Number 2 in T14N R62W Section 4 on the eastern edge of this unit, extending west to T15N R64W Section 27 on the unit's western edge. However, 2004 surveys found neither subpopulations nor PCEs east of Section 32; therefore, the eastern end of this proposed unit was dropped from final critical habitat designation. Similarly, 2004 surveys found no subpopulations or PCEs necessary to provide suitable habitat in the entire eastern reach on the border of Wyoming and Nebraska (Reach 2 of the proposal); therefore, the Service eliminated the eastern reach of the proposal from final critical habitat designation.

While 2004 surveys found subpopulations of the *G. n.* ssp. *coloradensis* throughout the originally proposed western reach (Reach 1) of this unit, WEAs were secured with several landowners throughout this area. Therefore, these areas were removed from this unit. For those areas designated as critical habitat, this stream reach is primarily identified as PEMC with sparse amounts of PEMA. This unit may require special management for appropriate levels of grazing needed to maintain open habitat in some areas, and management for reduced levels of grazing in others; special management to maintain surface or subsurface water flows; and the application of herbicides used to control noxious weeds.

Unit 7: Borie

Unit 7 consists of two stream reaches encompassing a total of 197 ha (486 ac) along 12.3 km (7.6 mi) of Diamond Creek and Lone Tree Creek in Laramie County, Wyoming. This unit is primarily under private ownership, with some Wyoming State lands. This unit may require special management for appropriate levels of grazing needed to maintain open habitat in some areas, and management for reduced levels of grazing in others; the application of herbicides used to control noxious weeds; and preventing harmful habitat fragmentation from residential and urban development.

Reach 1: This population is confluent with another population downstream along Diamond Creek on WAFB. Subpopulations of *G. n.* ssp. *coloradensis* have been found along Diamond Creek from the eastern boundary of this reach within T14N R67W Section 33, adjacent to WAFB, approximately 5.6 km (3.5 mi) of stream southwest to T13N R67W Section 6. Subpopulations also have been found along smaller, unnamed tributaries to Diamond Creek from the eastern edge of T14N 67W Section 32 approximately 3 km (2 mi) upstream within several small tributaries in Section 31 and T13N R67W Section 6.

Surveys conducted during 2004 found many subpopulations, including the largest subpopulation within the plant's known distribution, throughout all areas surveyed with the exception of two 0.8 km (0.5 mi) stream segments within Reach 1—these stream segments were dropped from the final critical habitat designation because they did not contain PCEs. Because a WEA was secured to provide for the conservation needs of *G. n.* ssp. *coloradensis* within T13N R67W Sections 5 and 6, this portion of Reach 1 of the proposed critical habitat was dropped from the final designation. Similarly, because a WEA was secured to provide for the conservation of the only known subpopulation found within Reach 2 of the proposal, and the remainder of the proposed Reach 2 contained neither *G. n.* ssp. *coloradensis* plants nor PCEs, this entire reach was dropped from the final designation. Habitat throughout this entire reach is PEMC intermixed with PEMA. This reach supports a large number of plants within several subpopulations, conducive to the development of considerable local genetic variation contributing to the conservation of this species.

Reach 2: This reach was described as Reach 3 in the proposed critical habitat rule. Subpopulations of *G. n.* ssp. *coloradensis* have been found along Lone Tree Creek, from the northwest corner of T13N R67W Section 31, to 5 km (3 mi) upstream to T13N R68W Section 26. Because a WEA has been secured to provide for conservation of *G. n.* ssp. *coloradensis* within Sections 25 and 26, this reach has been reduced in size accordingly for the final critical habitat designation. This creek segment occurs at the southernmost point of the plant's distribution within Wyoming, with very little possibility for genetic exchange between local subpopulations and other populations that may be in the general area. Conditions are conducive to locally adapted subpopulations containing genetic variability important to the species' long-term persistence.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports

provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the action agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect *G. n.* ssp. *coloradensis* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration or Federal Emergency Management Agency funding), also will continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the *G. n.* ssp. *coloradensis.* Federal activities that, when carried out, may adversely affect critical habitat for the *G. n.* ssp. *coloradensis* include, but are not limited to:

(1) Any action that changes existing water management practices including regulation of activities affecting waters of the United States by the Army Corps of Engineers under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by any Federal agency; and,

(3) Road construction and maintenance, right-of-way designation, and regulation funded or permitted by the Federal Highway Administration.

We consider all critical habitat units to be occupied by the species based on the most recent survey data collected for populations of *G. n.* ssp. *coloradensis.* Survey results found subpopulations of plants, or scattered individual plants, throughout each critical habitat unit included in this designation. To ensure that their actions do not jeopardize the continued existence of the species, Federal agencies already consult with us on activities in areas currently occupied by the species or if the species may be affected by the action. We consider all lands included in this final designation to be essential to the conservation of the *G. n.* ssp. *coloradensis.*

Exclusions From Critical Habitat

Lands Under U.S. Air Force Jurisdiction

As discussed in the proposed rule, Section 318 of fiscal year 2004 National Defense Authorization Act (Pub. L. 108–136) amended the Act to address the relationship of INRMPs to critical habitat by adding a new section 4(a)(3)(B). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

As described above, we identified habitat essential for the conservation of *G. n.* ssp. *coloradensis* in Laramie and Platte Counties in Wyoming. We have examined the INRMP for the WAFB to determine coverage for *G. n.* ssp. *coloradensis.* The INRMP identifies management issues related to conservation and enhancement of *G. n.* ssp. *coloradensis* and identifies goals and objectives that involve the protection of populations and habitat for this species. Some objectives for achieving those goals include: continue to participate in, and encourage development of, Cooperative Agreements and Memorandum of Understanding activities with Federal, State, and local government and support agencies; promote and support the scientific study and investigation of federally listed species management, conservation, and recovery; restrict public access in existing and potential habitat areas; and increase public education of federally listed species through management actions, the WAFB Watchable Wildlife Program, and a Prairie Ecosystem Education Center (WAFB 2001). Based on the beneficial measures for *G. n.* ssp. *coloradensis* contained in the INRMP for WAFB, we conclude that the INRMP provides a benefit to the species and have not included this area in the designation of critical habitat for *G. n.* ssp. *coloradensis* pursuant to section 4(a)(3) of the Act. We will continue to work cooperatively with the Department of the Air Force to assist the WAFB in implementing and refining the programmatic recommendations contained in this plan that provide benefits to *G. n.* ssp. *coloradensis.* The non-inclusion of WAFB demonstrates

the important contributions that approved INRMPs have to the conservation of the species. As with HCP exclusions, a related benefit of excluding Department of Defense lands with approved INRMPs is to encourage continued development of partnerships with other stakeholders, including States, local governments, conservation organizations, and private landowners to develop adequate management plans that conserve and protect *G. n.* ssp. *coloradensis* habitat.

Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

Wildlife Extension Agreements (WEAs)

We are excluding 11 properties from this final critical habitat designation that have WEAs in place for *Gaura neomexicana* ssp. *coloradensis* because we believe that they are appropriate for exclusion pursuant to the ''other relevant factor provisions of section 4(b)(2). Nine of the WEAs are with private landowners in Wyoming, including one located in Unit 4 (1,300 ac), one in Unit 5 (145 ac), five in Unit 6 (439 ac), and two in Unit 7 (200 ac). Two WEAs are with city municipalities including the City of Cheyenne, Wyoming (within Unit 7, 200 ac), and the City of Fort Collins, Colorado (all of Unit 8, 280 ac).

The goals of the above WEAs for the properties are similar in nature and include the following elements:

(1) Monitoring *G. n.* ssp. *coloradensis* populations and habitat conditions. Data collected during monitoring will include the number of flowering adult plants and habitat condition. Habitat condition in areas managed primarily for livestock grazing will be evaluated according to NRCS (2001) rangeland condition assessment methodology. Data will provide information regarding the effects of land management activities on Colorado butterfly plant habitat and population growth;

(2) For those areas managed primarily for hay production, coordinating hay cutting activity with needs of *G. n.* ssp. *coloradensis* seed production. The landowner agrees to inform the Service prior to the intended first cutting and allow the Service or its designee the opportunity to conduct Colorado butterfly plant surveys. The landowner agrees to allow the Service or its designee at least one additional opportunity to conduct Colorado butterfly plant surveys after the initial cutting, and prior to any additional cuttings. If three or more years of data collection reveals that the conservation needs of the Colorado butterfly plant could substantially benefit from changes in hay production activities, the landowner agrees to work with the Service to modify these activities to the extent feasible;

(3) Controlled application herbicides to no closer than 100 feet of a known subpopulation of *G. n.* ssp. *coloradensis.* Some areas included in WEAs that are occupied by the Colorado butterfly plant also are occupied by invasive plant species in need of control, such as Canada thistle and leafy spurge. While herbicide application may be required to control the spread of these invasive species, the landowner agrees to the application of herbicides no closer than 100 feet of a known subpopulation of the Colorado butterfly plant; and

(4) Managing livestock grazing activities in conjunction with conservation needs of *G. n.* ssp. *coloradensis.* It is assumed that the Colorado butterfly plant requires habitat in average, or above average, range condition according to the criteria identified above. However, if it is found that some other grazing intensity or timing of grazing is beneficial to the Colorado butterfly plant—resulting in above or below average range condition as defined by the NRCS criteria above—then that identified range condition will become the new target for that location to the extent practicable.

(1) Benefits of Inclusion

Designation of critical habitat provides important information on those habitats and their primary constituent elements that are essential to the conservation of the species. This information is particularly important to any Federal agency, State, county, local jurisdiction, conservation organization, or private landowner that may be evaluating adverse actions or implementing conservation measures that involve those habitats. The benefit of a critical habitat designation would ensure that any actions authorized, funded, or carried out by a Federal agency would not likely destroy or adversely modify any critical habitat. All habitats within this designation are occupied. In the absence of critical habitat, any section 7 consultation for potential adverse effects to the species would not ensure adverse modification of critical habitat is avoided; however, the consultation would ensure the proposed action would not jeopardize the continued existence of the species in the wild.

Where WEAs are in place, our experience indicates that this benefit is small. Currently approved WEAs are already designed to address specific threats to provide for the conservation of *Gaura neomexicana* ssp. *coloradensis* and to implement conservation actions on the ground. Ninety percent of this species' occurrence is on private land, and, as a federally threatened plant, there are no prohibitions against take under the Act. The primary threats to the species on private land (nonselective herbicide use, grazing, and hay mowing) have no Federal nexus requiring section 7 consultation and so cannot be addressed through the statutory prohibition on adverse modification of critical habitat by Federal agency actions. Since the plants were listed in October 2000, we have no records indicating that section 7 consultation has been required for any such activities occurring on private lands. The likelihood that there will be any need to consult on such activities in the future is low.

(2) Benefits of Exclusion

Section 10(a)(1)(B) of the Act allows non-Federal parties planning activities that have no Federal nexus, but which could result in the incidental taking of listed animals, to apply for an incidental take permit—the application for which includes a Habitat Conservation Plan (HCP). However, such a process is unnecessary for a threatened plant such as *G. n.* ssp. *coloradensis* because there are no take prohibitions. Consequently, an HCP is an unduly demanding mechanism by which to protect the conservation needs of this species, one unlikely to be undertaken by landowners.

The WEAs, as written, meet the Service's criteria for providing adequate management protection, as outlined on page 47845 of the proposed rule (August 6, 2004, 69 FR 47834). First, each agreement provides a conservation benefit to the species (*i.e.*, the agreement must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the agreement). The WEAs provide that each landowner agrees to spray herbicide no closer than within 31

meters (100 feet) of a known subpopulation. The landowner agrees to allow Service representatives access to the project site for data collection and monitoring *G. n.* ssp. *coloradensis* populations on an annual basis. Data collected during monitoring will include the number of flowering adult plants and habitat condition. Habitat condition in areas managed primarily for livestock grazing will be evaluated according to NRCS rangeland conditions assessment methodology (NRCS 2001). The Service assumes that *G. n.* ssp. *coloradensis* requires habitat in average, or above average, range condition according to the criteria identified above. However, while it is known that livestock grazing is compatible with the habitat needs of *G. n.* ssp. *coloradensis,* the optimal level of grazing and resulting range conditions, is not known. Therefore, the grazing intensity or timing of grazing that is found to be optimal for *G. n.* ssp. *coloradensis,* resulting in above or below average range condition as defined by the NRCS criteria above, will become the new target for that location to the extent practicable.

For those areas primarily managed for hay production, the landowner agrees to inform the Service prior to the intended first cutting and allow the Service or its designee the opportunity to conduct *G. n.* ssp. *coloradensis* surveys. The landowner also agrees to allow the Service or its designee at least one additional opportunity to conduct *G. n.* ssp. *coloradensis* surveys after the initial cutting, and prior to any additional cuttings. If three or more years of data collection, as outlined above, reveals that the conservation needs of *G. n.* ssp. *coloradensis* could benefit from changes in hay production activities, the landowner agrees to work with the Service to modify these activities to the extent feasible. For example, the landowner may modify timing of hay cutting in areas of concentrated subpopulations of *G. n.* ssp. *coloradensis* to allow for seed production, or avoid the cutting altogether of small areas of subpopulations of the plants.

Secondly, the WEAs provide assurances that the conservation management strategies and actions will be implemented. Each WEA was developed by the Wyoming Ecological Services Field Office with each individual landowner to ensure that all data collection and management activities were readily achievable during the key July-August flowering season for this species, while meeting the needs of the landowner. The Wyoming Field Office is responsible for implementing these agreements and is fully capable of accomplishing all objectives within each WEA each year.

Thirdly, each WEA provides assurances that the conservation strategies and measures will be effective. As outlined in details above, each WEA contains biological goals appropriate for the subpopulations on property included in the WEA, as well as provisions for monitoring, evaluating success, and modifying targets and management activities as more information becomes available through data collection. Considering the average lifespan of each plant is three years, a 15-year term allows for the management and study of five generations of plants, providing sufficient time to address effects of long term climatic trends (*e.g.,* drought) and their interactions with approaches to management.

Lastly, while the Service criteria provide guidance to Service staff and the public on the nature of agreements highly likely to result in exclusions, they in no way limit the Secretary's discretion to exclude areas under the statutory standards, and so we could properly exclude these areas even if they did not comply with the Service's criteria for conservation agreements for the reasons set out below.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the above considerations, and consistent with the direction provided in section 4(b)(2) of the Act and the recent Federal District Court decision concerning critical habitat (*Center for Biological Diversity* v. *Norton,* Civ. No. 01–409 TUC DCB D. Ariz. Jan. 13, 2003), we have determined that the benefits of excluding the properties encompassed by the 11 WEAs, located in portions of Unit 4, Unit 5, Unit 6, Unit 7, and all of Unit 8s, outweigh the benefits of including them as critical habitat for *G. n.* ssp. *coloradensis.*

Under the WEAs outlined above, the landowners and the Service will protect *G. n.* ssp. *coloradensis* from the key threats to the species on private lands that would otherwise continue notwithstanding a critical habitat designation. For example, controlled use of herbicides will eliminate mortality and increase survival rates of rosettes and reproductively mature plants. Grazing management will reduce direct mortality of reproductively mature plants and enable soils to maintain moisture content necessary for seed germination and rosette recruitment by eliminating overgrazing. At the same time, grazing will maintain an early- to mid-successional open habitat necessary for seed germination and rosette recruitment. Timing hay mowing to facilitate complete development of fruits and seeds will increase population size and ensure maintenance of genetic variation within populations. Increased fruit and seed set also will increase the long term viability of the population by contributing to the seed bank. Therefore, the WEAs that include actions to address the conservation needs of the species provide a biological benefit to the species, especially in light of concerns related to demographic uncertainty, low genetic variation, and limited colonization. All of the above allow the Service to manage the species proactively, instead of waiting for, and responding to, project level impacts involving a Federal nexus (which, as explained above, are expected to be infrequent).

In addition, by providing a perceived benefit to the landowner by exempting their lands from critical habitat in return for entering into this agreement, we encourage future cooperation in undertaking voluntary conservation measures for listed species by these and other landowners. We note again that the ESA has no statutory mechanism to either encourage or require the ''special management or protection'' that may be needed for the PCEs of listed species on non-Federal land that might be designated as critical habitat, and these types of voluntary agreements are currently the only mechanisms for obtaining these management actions. Because most landowners oppose critical habitat designation on their lands, such a designation generally precludes their willingness to undertake conservation measures on behalf of the species. Yet active conservation measures by landowners or land managers are generally the only way to conserve the species, often leaving us with exclusions from critical habitat as the most practical means of obtaining the ''special management or protection'' the designation was intended to secure.

In conclusion, we find that the exclusion of critical habitat from portions of Unit 4, Unit 5, Unit 6, Unit 7, and all of Unit 8 would most likely have a net positive effect on the conservation of *G. n.* ssp. *coloradensis* when compared to the conservation effects of a critical habitat designation. As described above, the overall benefits to this species of a critical habitat designation for these properties are relatively small. In contrast, we believe that this exclusion will enhance our existing partnership with these landowners, and it will set an example and provide positive incentives to other

non-Federal landowners who may be considering implementing conservation activities on their lands. We conclude that there is a higher likelihood of beneficial conservation activities occurring in these and other areas of southeastern Wyoming without designated critical habitat than there would be with designated critical habitat on these properties.

(4) Conclusion

In considering whether or not exclusion of these properties might result in the extinction of this species, the Service considered the impacts to the *Gaura neomexicana* ssp. *coloradensis.* For the *G. n.* ssp. *coloradensis* populations located within the Units 4, 5, 6, 7, and 8, the Service concludes that the WEAs agreed to by the landowners will provide as much or more net conservation benefits as would be provided if these properties were designated as critical habitat. These WEAs, which are described above, will provide tangible proactive conservation benefits that will reduce the likelihood of extinction for the *G. n.* ssp. *coloradensis* and increase its likelihood of recovery. The exclusion of these areas will not increase the risk of extinction to this species, and it may increase the likelihood this species will recover by encouraging other landowners to implement voluntary conservation actions as current participants in WEAs have done. In sum, the above analysis concludes that an exclusion of these properties from final critical habitat for the *G. n.* ssp. *coloradensis* will have a net beneficial impact with little risk of negative impacts. Therefore, the exclusion of these lands will not cause extinction and should improve the chances of conserving the *G. n.* ssp. *coloradensis.*

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on September 24, 2004. We accepted comments on the draft analysis until October 25, 2004.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the *G. n.* ssp. *coloradensis.* This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land-use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

A copy of the final economic analysis with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section) or for downloading from the Internet at *http://mountain-prairie.fws.gov/species/plants/cobutterfly/index.htm.*

We received three comment letters on the draft economic analysis of the proposed designation. Following the close of the comment period, we considered comments, prepared responses to comments, and prepared a summary of revisions to economic issues based on final critical habitat designation (*see* Responses to Comments section). The economic analysis indicates that is rule will not have an annual economic effect of $100 million or more. The economic analysis employs a lower and upper scenario approach to the economic costs. The efficiency costs for the lower bound scenario are estimated to be $83,890 from 2005 to 2024. The efficiency costs for the upper bound scenario are estimated to be $104,690 from 2005 to 2024. The annualized economic effects of this designation are estimated to be $6,424 (lower bound scenario) and $8,263 (upper bound scenario). We have excluded 4,948 ac (2,002 ha) of privately and municipally owned lands analyzed in the draft economic analysis based on non-economic considerations so the direct economic impacts of the final designation is likely to be lower than this estimate.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this final rule easier to understand, including answers to questions such as the following—(1) Are the requirements in the final rule clearly stated? (2) Does the final rule contain technical jargon that interferes with the clarity? (3) Does the format of the final rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the final rule? (5) What else could we do to make this final rule easier to understand?

Send a copy of any comments on how we could make this final rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC. 20240. You may e-mail your comments to this address, *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific area as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we

determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

The economic analysis indicates that is rule will not have an annual economic effect of $100 million or more.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

Small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number''small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect bull trout. Federal agencies also must consult with us if their activities may affect critical habitat. Therefore, designation of critical habitat could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities.

On the basis of information in our final economic analysis, we have determined that a substantial number of small entities are not affected by the critical habitat designation for *G. n.* ssp. *coloradensis*. Therefore, we are certifying that the designation will not have a significant effect on a substantial number of small entities. The factual basis for certifying that this rule will not have a significant economic impact on a substantial number of small entities is as follows.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the approximately four small businesses, on average, that may be required to consult with us each year regarding their project's impact on *G. n.* ssp. *coloradensis* and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We also may identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats

it faces, as described in the final listing rule and this critical habitat designation. Within the final critical habitat units, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Army Corps of Engineers under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;

(3) Regulation of timber harvest, grazing, mining, and recreation by the Forest Service and Bureau of Land Management;

(4) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;

(5) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency; and

(6) Activities funded by the Environmental Protection Agency, U.S. Department of Energy, or any other Federal agency.

It is likely that a project proponent could modify a project or take measures to protect *G. n.* ssp. *coloradensis*. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include Army Corps of Engineers permits, permits we may issue under section 10(a)(1)(B) of the Act, Federal Highway Administration funding for road improvements, hydropower licenses issued by the Federal Energy Regulatory Commission, and regulation of timber harvest, grazing, mining, and recreation by the Forest Service and Bureau of Land Management. A regulatory flexibility analysis is not required.

For these reasons, we are certifying that the designation of critical habitat for *G. n.* ssp. *coloradensis* will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et. seq.)

Under the SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designate critical habitat for *G. n.* ssp. *coloradensis* is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, Tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500 million or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were—Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, a Small Government Agency Plan is not required.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with the Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this final critical habitat designation with appropriate State resource agencies in Wyoming, Colorado, and Nebraska. The designation of critical habitat in areas currently occupied by *G. n.* ssp. *coloradensis* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. We are designating areas only in Wyoming. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *G. n.* ssp. *coloradensis.*

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (Ninth Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996). However, when the range of the species includes States within the Tenth Circuit, such as that of *G. n.* ssp. *coloradensis*, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service*, 75 F.3d 1429 (Tenth Cir. 1996), we have undertaken a NEPA analysis for critical habitat designation and have notified the public of the availability of the Draft EA for the proposed rule when it is finished. A final EA is available upon request from the Field Supervisor, Wyoming Fish and Wildlife Office (*see* **ADDRESSES** section).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. We have determined that there are no tribal lands essential for the conservation of *G. n.* ssp. *coloradensis.* Therefore, designation of critical habitat for the *G. n.* ssp. *coloradensis* has not been designated on tribal lands.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Wyoming Fish and Wildlife Office (*see* **ADDRESSES** section).

Author

The primary author of this package is Tyler Abbott (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we proposed to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.12(h), revise the entry for *Gaura neomexicana* ssp. *coloradensis* under ''FLOWERING PLANTS'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special Rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Gaura neomexicana ssp. *coloradensis*.	Colorado butterfly plant.	U.S.A. (WY, NE, CO).	Onagraceae-Evening Primrose.	T	704	17.96(a)	NA
*	*	*	*	*	*	*	

■ 3. In § 17.96(a), amend paragraph (a) by adding an entry for *Gaura neomexicana* ssp. *coloradensis* in alphabetical order under Family Onagraceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family Onagraceae: *Gaura neomexicana* ssp. *coloradensis* (Colorado butterfly plant)

(1) Critical habitat units are depicted for Laramie and Platte Counties in Wyoming, on the maps below.

(2) The primary constituent elements of critical habitat for *Gaura neomexicana* ssp. *coloradensis* are:

(i) Subirrigated, alluvial soils on level or low-gradient floodplains and drainage bottoms at elevations of 1,524 to 1,951 meters (5,000 to 6,400 feet).

(ii) A mesic moisture regime, intermediate in moisture between wet, streamside communities dominated by sedges, rushes, and cattails, and dry upland shortgrass prairie.

(iii) Early- to mid-succession riparian (streambank or riverbank) plant communities that are open and without dense or overgrown vegetation (including hayed fields, grazed pasture, other agricultural lands that are not plowed or disced regularly, areas that have been restored after past aggregate extraction, areas supporting recreation trails, and urban/wildland interfaces).

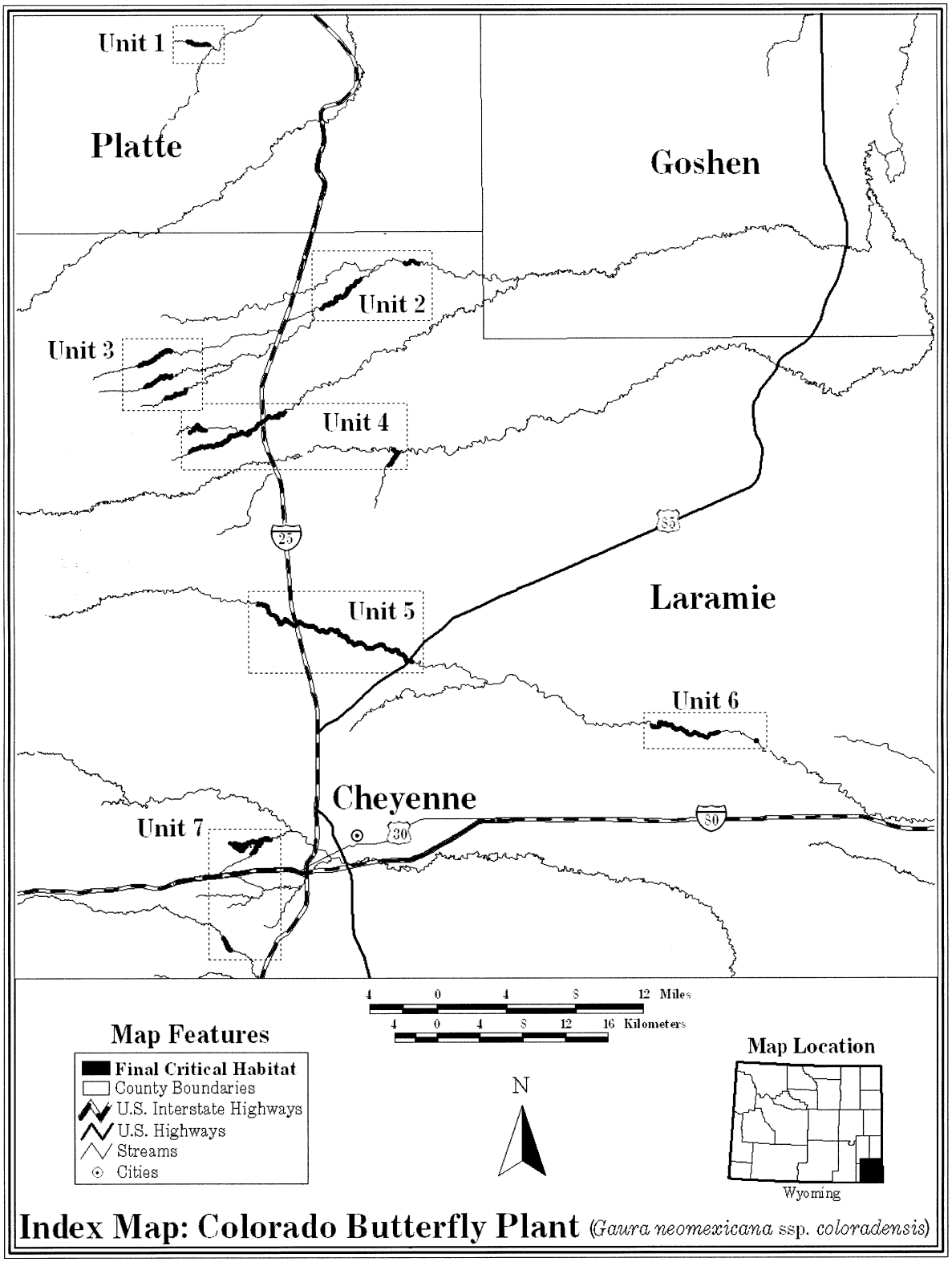
(iv) Hydrological and geological conditions that serve to create and maintain stream channels, floodplains, floodplain benches, and wet meadows that support patterns of plant communities associated with *Gaura neomexicana* ssp. *coloradensis.*

(3) Critical habitat does not include man-made structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, and roads, and the land on which such structures are located.

(4) Final critical habitat units are described below. Data layers defining map units were created based on U.S. Geological Survey 7.5″ quadrangle maps (Borie, Bristol Ridge, Bristol Ridge NE, Burns, Cheyenne North, C S Ranch, Double L Ranch, Durham, Farthing Ranch, Hillsdale, Hirsig Ranch, Indian Hill, J H D Ranch, Lewis Ranch, Moffett Ranch, Nimmo Ranch, Pine Bluffs, P O Ranch, Round Top Lake) and corresponding U.S. Fish and Wildlife Service National Wetlands Inventory maps. Critical habitat is based on the most current maps of surveyed subpopulations. Critical habitat also includes adjacent areas, upstream and downstream, containing suitable hydrologic regimes, soils, and vegetation communities to allow for seed dispersal between populations and maintenance of the seed bank. To ease identification of the critical habitat, the boundaries follow section lines and major geographical features where feasible. The outward extent of critical habitat is 91 meters (300 feet) from the center line of the stream edge (as defined by the ordinary high-water mark). This amount of land will support the full range of primary constituent elements essential for persistence of *G. n.* ssp. *coloradensis* populations and should adequately protect the plant and its habitats from secondary impacts of nearby disturbance.

(5) **Note:** Index Map follows:

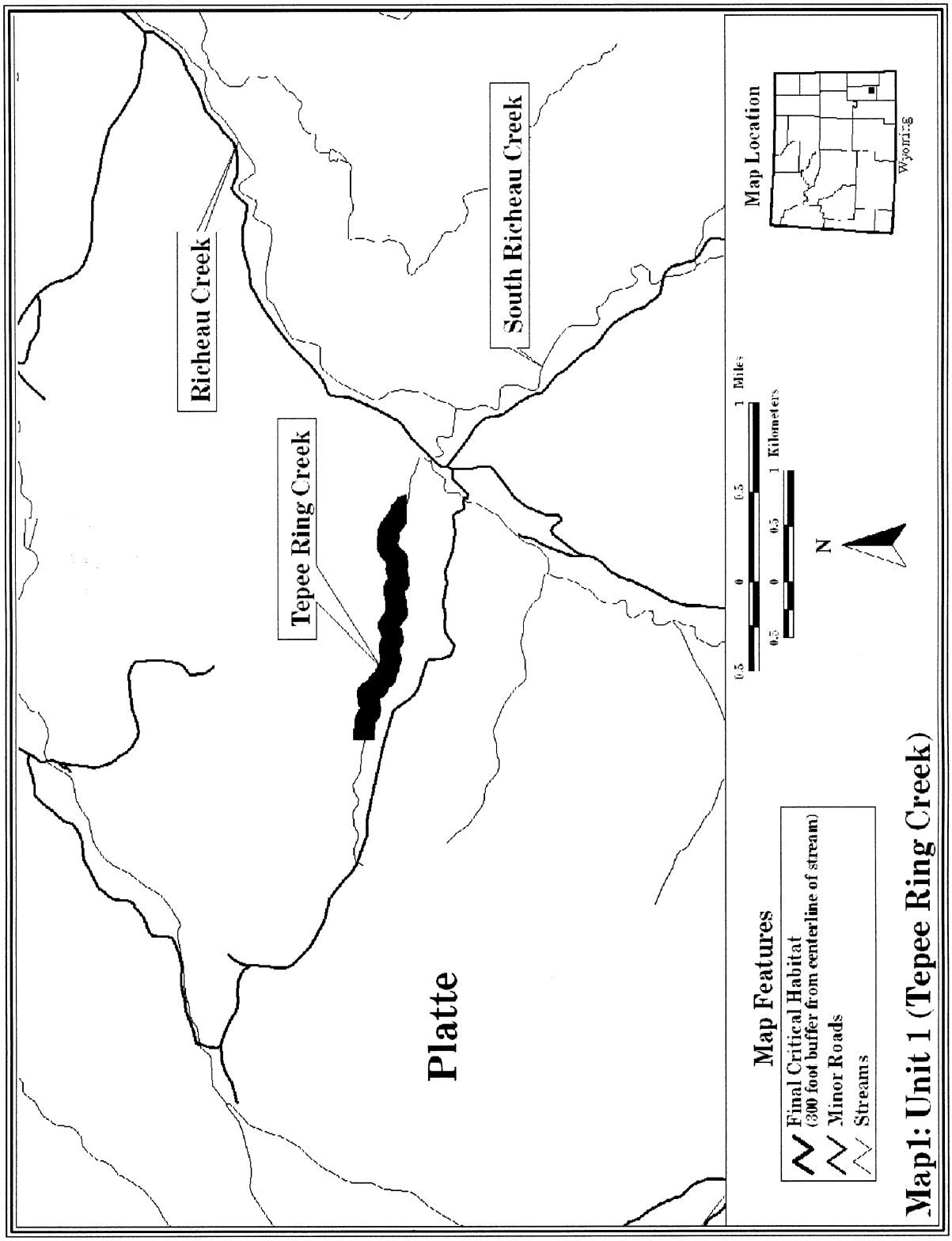
BILLING CODE 4310–55–P



(6) Unit 1: Tepee Ring Creek, Platte County, Wyoming.

(i) This unit consists of 2.4 km (1.5 mi) of Tepee Ring Creek bounded by the western edge of Sec. 2, T21NR68W, extending downstream including S2S2 of Sec. 2; downstream to SW4SW4 Sec. 1, bounded by the southern line of Sec. 1.

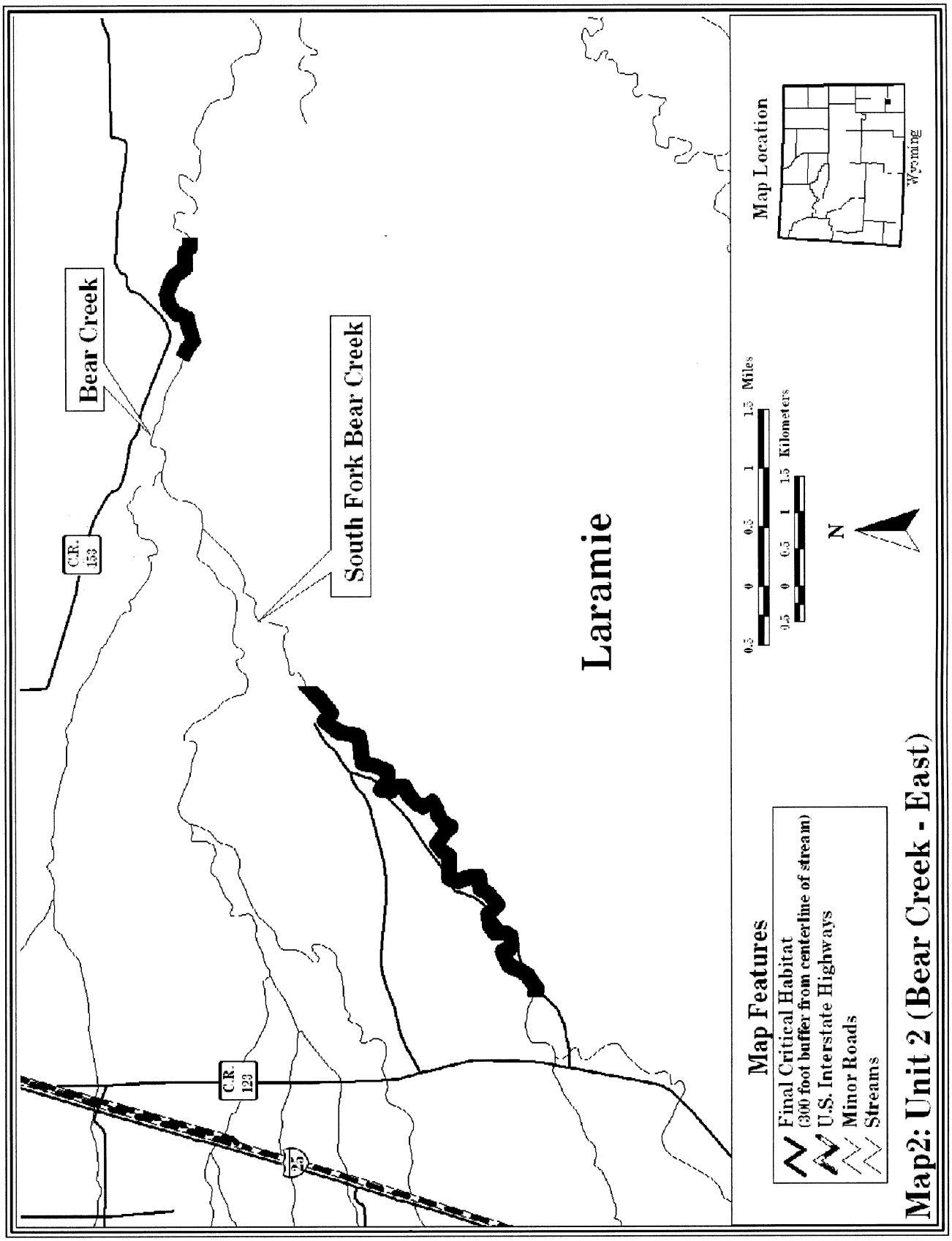
(ii) **Note:** Unit 1 (Map 1) follows:



(7) Unit 2: Bear Creek East, Laramie County, Wyoming.

(i) This unit consists of 8 km (5 mi) of the South Fork of the Bear Creek. Includes T19N R67W, NW4 Sec. 25; NE4 Sec. 25; downstream into T19N R66W, S2 SW4 Sec. 19; N2 SE4 Sec. 19; NW4 Sec. 20; SE4 SW4 Sec. 17; SE4 Sec. 17; NE4SW4; N2 SE4 Sec. 11; N2 SW4 Sec. 12.

(ii) **Note:** Unit 2 (Map 2) follows:


Bear Creek
South Fork Bear Creek
C.R. 153
C.R. 129
Laramie
Map Location
Wyoming
0.5 0 0.5 1 1.5 Miles
0.5 0 0.5 1 1.5 Kilometers
N
Map Features
Final Critical Habitat
(300 foot buffer from centerline of stream)
U.S. Interstate Highways
Minor Roads
Streams
Map2: Unit 2 (Bear Creek - East)

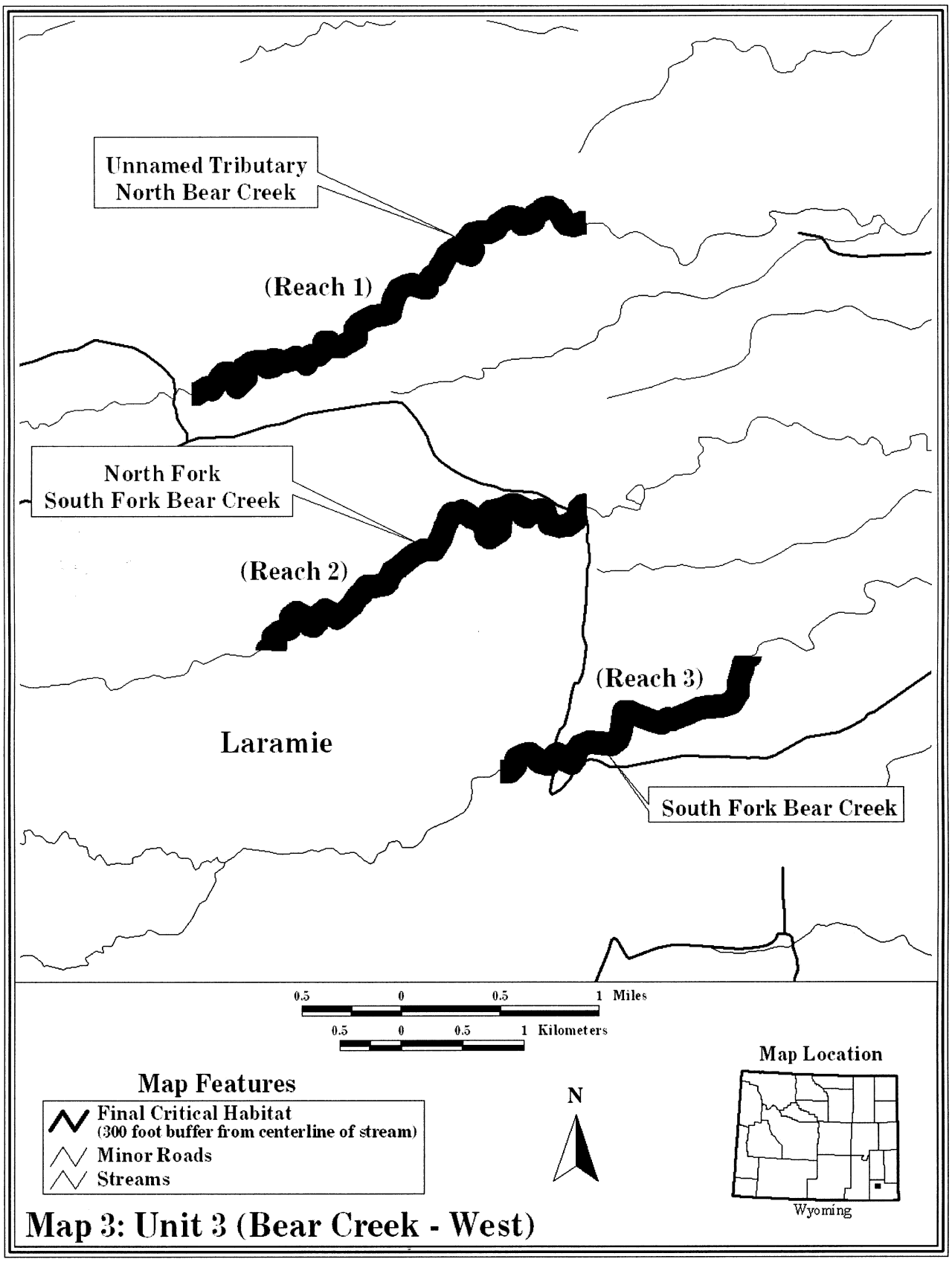
(8) Unit 3: Bear Creek West, Laramie County, Wyoming.

(i) Reach 1 consists of 4.7 km (2.9 mi) of an unnamed south tributary of North Bear Creek in the valley between North Bear Creek and the North Fork of the South Fork Bear Creek. Includes T18N R68W, N2 SW4 Sec. 8; downstream to NW4NW4SE4 Sec. 8; SE4NE4 Sec. 8; NW4NW4 Sec. 9; SE4SW4 Sec. 4; S2 SE4 Sec. 4.

(ii) Reach 2 consists of 4.2 km (2.6 mi) of the North Fork of the South Fork Bear Creek, upstream of Nimmo Reservoir No. 9. Includes T18N R68W, SE4SW4 Sec. 17; downstream to N2SW4SE4 Sec. 17; NW4SE4SE4 Sec. 17; S2NE4SE4 Sec. 17; NW4SW4 Sec. 16; SE4NW4 Sec. 16; S2 NE4 Sec. 16.

(iii) Reach 3 consists of 2.8 km (1.7 mi) of the South Fork Bear Creek. Includes T18NR68W, N2N2SE4 Sec. 21; downstream to S2NW4 Sec. 22; NW4SW4NE4 Sec. 22; SE4NW4NE4 Sec. 22; W2 NE4NE4 Sec. 22.

(iv) **Note:** Unit 3 (Map 3) follows:

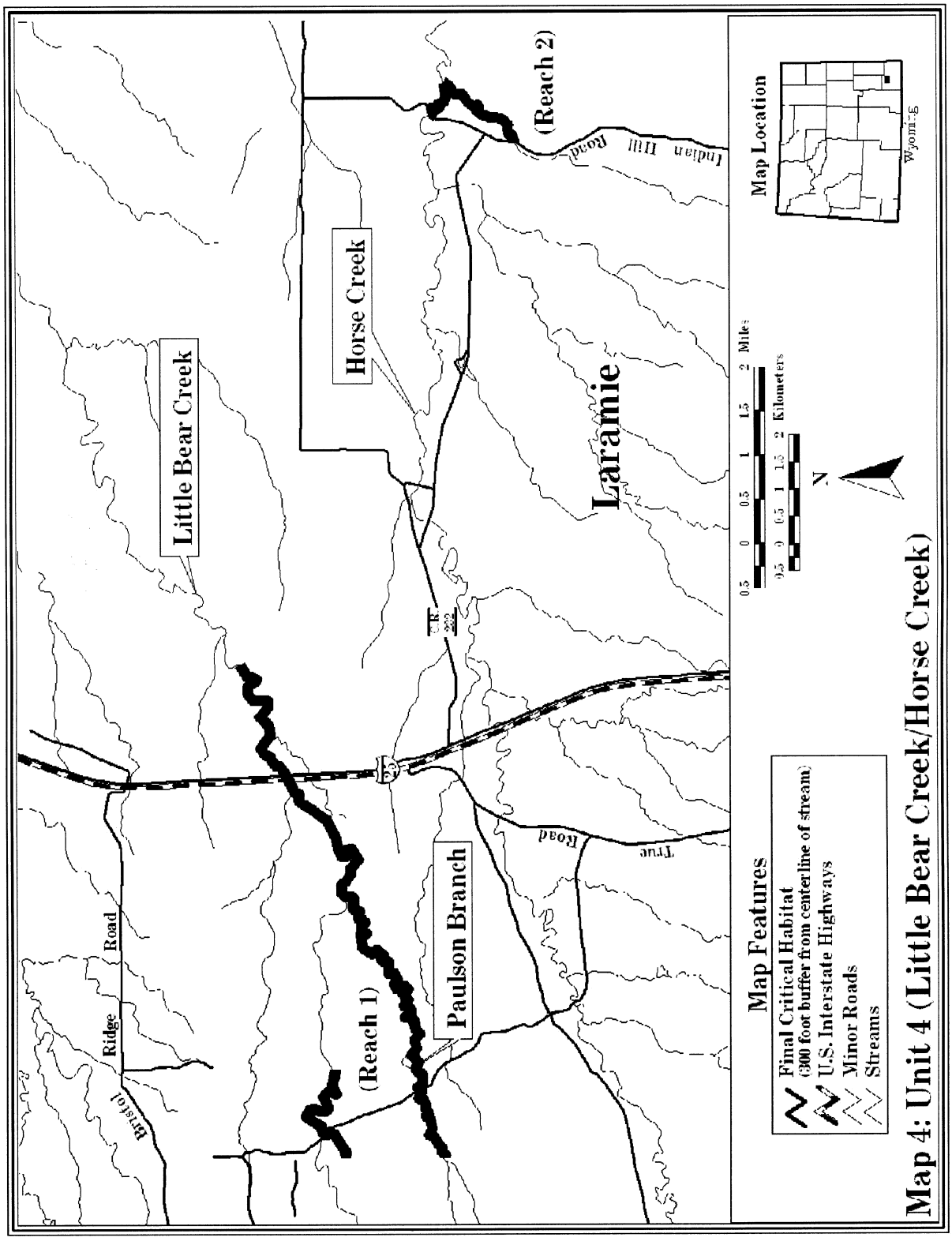

Unnamed Tributary
North Bear Creek
(Reach 1)
North Fork
South Fork Bear Creek
(Reach 2)
(Reach 3)
Laramie
South Fork Bear Creek
0.5 0 0.5 1 Miles
0.5 0 0.5 1 Kilometers
Map Features
Final Critical Habitat
(300 foot buffer from centerline of stream)
Minor Roads
Streams
N
Map Location
Wyoming
Map 3: Unit 3 (Bear Creek - West)

(9) Unit 4: Little Bear Creek/ Horse Creek, Laramie County, Wyoming.

(i) Reach 1 consists of 16 km (10 mi) of Little Bear Creek, which includes approximately 5 mi (8 km) of the Paulson Branch tributary. Little Bear Creek includes T18NR68W, NW4NW4SW4 Sec. 35; downstream to N2 Sec. 35.T18NR67W, N2SW4 Sec. 32; NE4 Sec. 32; NW4NW4NW4 Sec. 33; S2 Sec. 28; NW4SW4 Sec. 27; S2 SE4NW4 Sec. 27. Paulson Branch includes T18N R68W, N2SW4 Sec. 2; downstream to S2NE4 Sec. 2; N2 Sec. 1; T18N67W, NW4NW4 Sec. 6; SE4SW4 Sec. 31; SE4 Sec. 31.

(ii) Reach 2 consists of 2.7 km (1.7 mi) of an unnamed tributary to Horse Creek on the far eastern end just east of, and parallel to, Indian Hill Road. Includes T17N R66W,W2SW4 Sec. 2; NE4 Sec. 10.

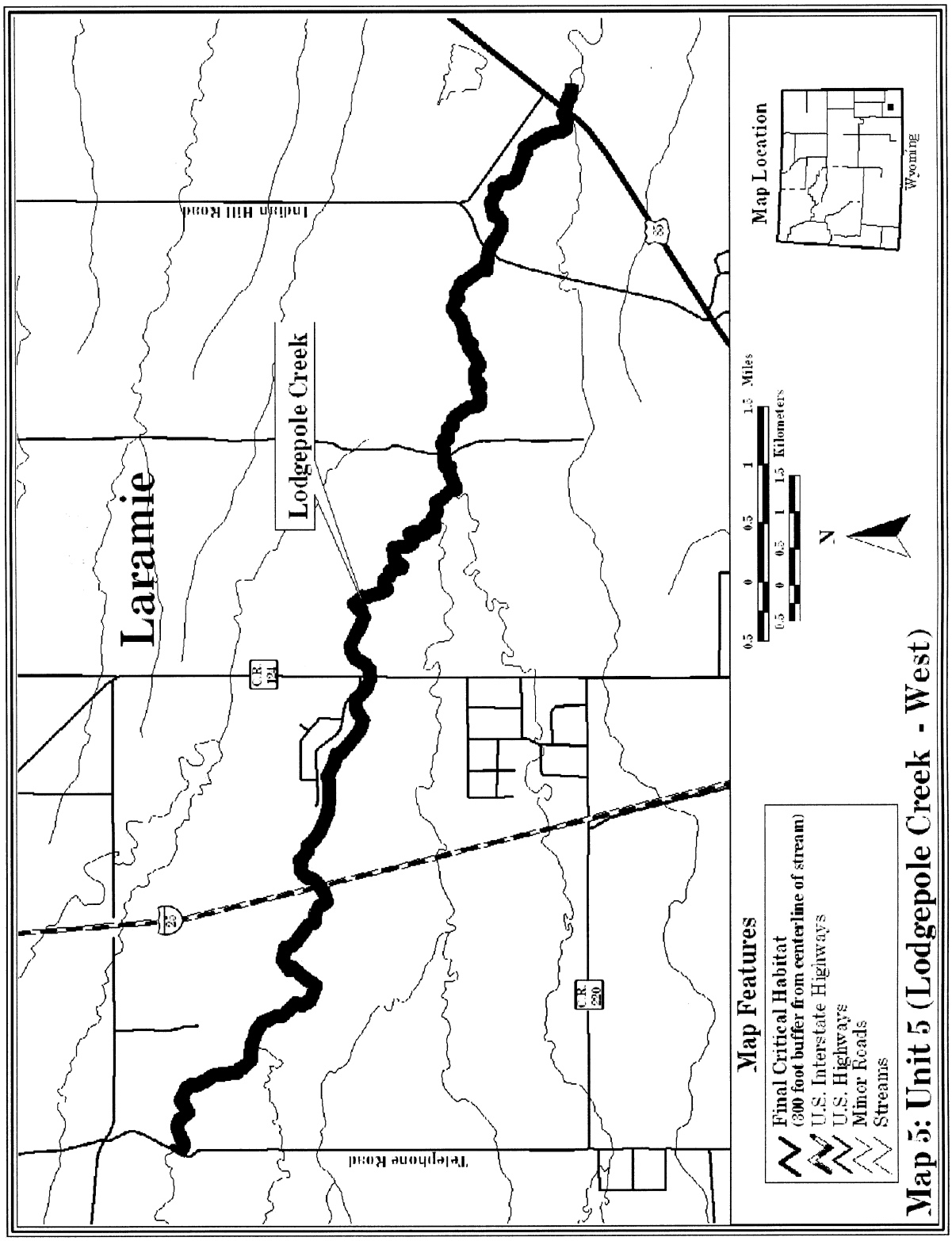
(iii) **Note:** Unit 4 (Map 4) follows:



(10) Unit 5: Lodgepole Creek West, Laramie County, Wyoming.

(i) This unit consists of approximately 20.4 km (12.7 mi) west along Lodgepole Creek from State highway 85. Includes T16N R67W, N2 SW4 Sec. 21; W2 SE4 Sec. 21; N2 NE4 Sec. 28; W2 NW4 Sec. 27; N2 S2 Sec. 27; SW4NE4 Sec. 27; S2 Sec. 26; S2 SW4 Sec. 25; N2 NE4 Sec. 36; T16N R66W, N2 Sec. 31; downstream to SW4NW4 Sec. 32; SW4 Sec. 32; S2 SE4 Sec. 32; SW4SW4 Sec. 33; SE4SE4 Sec. 33; S2 SW4 Sec. 34; T15N R66W, N2N2 Sec. 4; downstream to NE4NW4 Sec. 3; N2 NE4 Sec. 3; NW4 Sec. 2; SE4 Sec. 2.

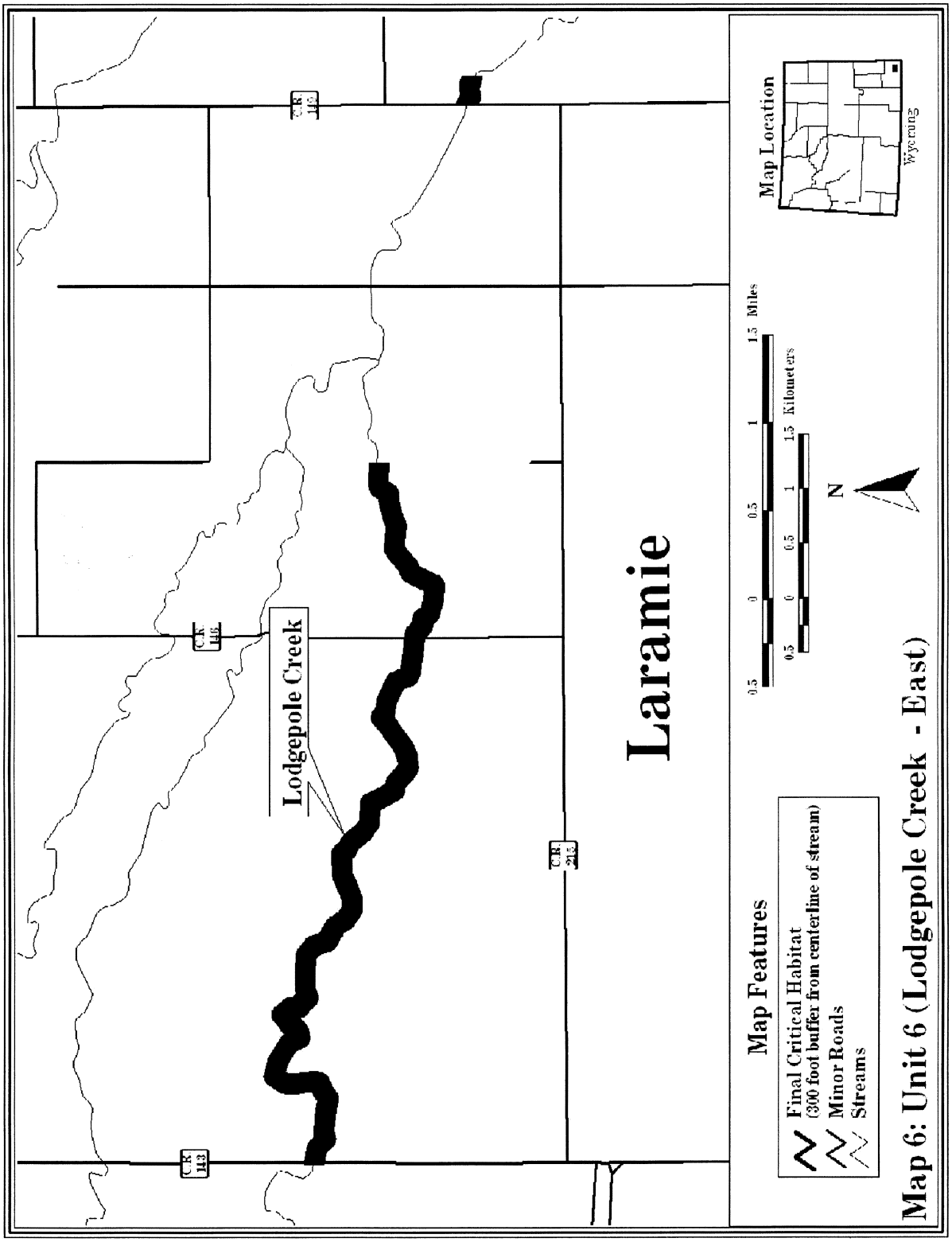
(ii) **Note:** Unit 5 (Map 5) follows:



(11) Unit 6: Lodgepole Creek East, Laramie County, Wyoming.

(i) Consists of 8.4 km (5.2 mi) of Lodgepole Creek from approximately 3.2 km (2 mi) northeast of the town of Hillsdale on the west end of the reach, downstream to approximately 0.4 km (0.25 mi) east of State highway 213, approximately 3.2 km (2 mi) north of the town of Burns. Includes T15NR64W, N2SW4 Sec. 29; SE4SE4NW4 Sec. 29; S2NE4 Sec. 29; S2 Sec. 28; S2S2 Sec. 27; N2N2 Sec. 34; N2N2 Sec. 35; S2 SE4SE4 Sec. 26; T15NR62W, N2NW4 SW4 Sec. 32.

(ii) **Note:** Unit 6 (Map 6) follows:

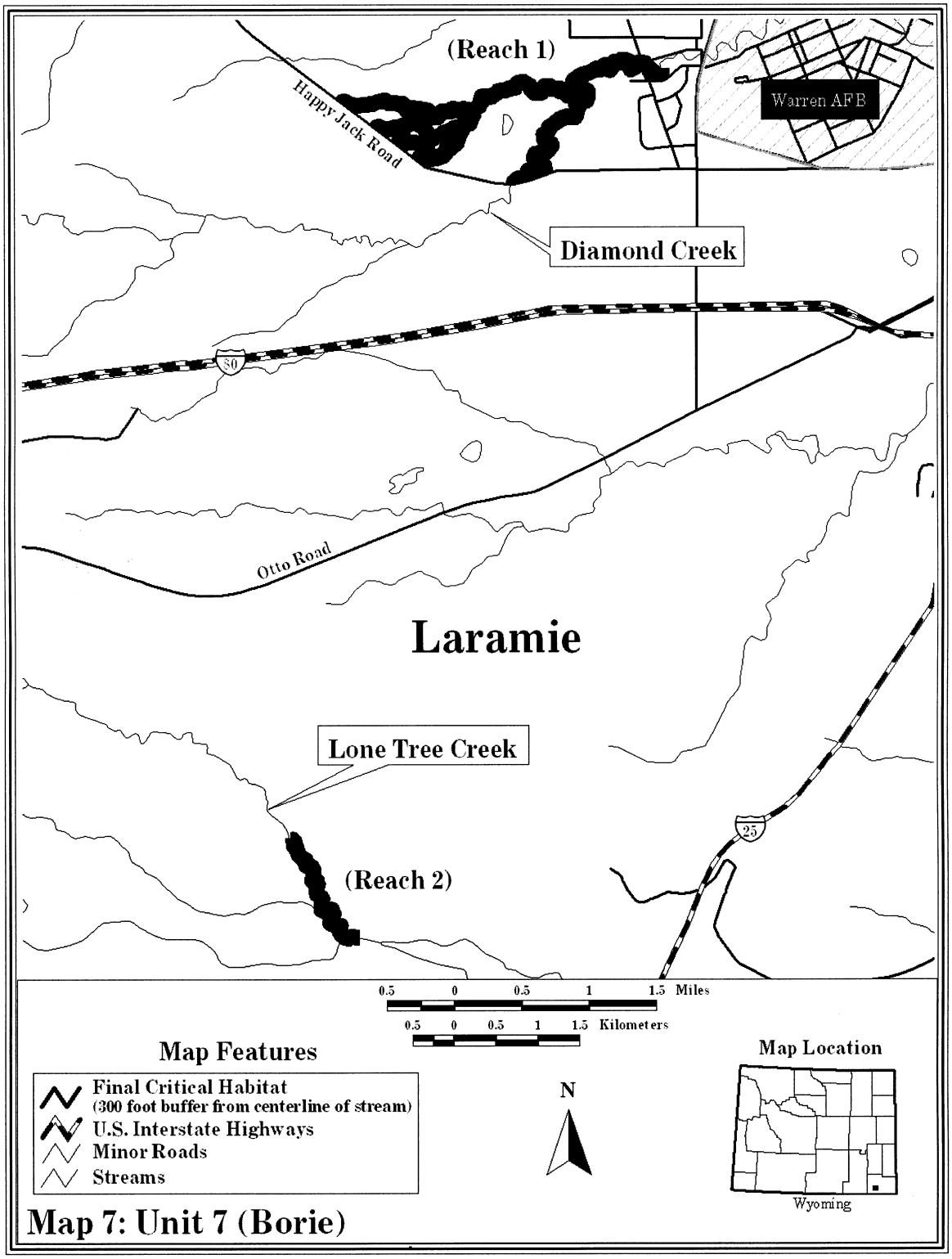


(12) Unit 7: Borie, Laramie County, Wyoming.

(i) Reach 1 consists of 10.5 km (6.5 mi) along Diamond Creek west of F.E. Warren Air Force Base and other smaller tributaries merging from the north. Includes T14NR67W, N2 Sec. 33; upstream to NW4SW4 Sec. 33; S2 NE4 Sec. 32; E2 SE4 Sec. 32; SW4 Sec. 32; SE4 Sec. 31; T13N R67W, N2N2NE4 Sec. 5.

(ii) Reach 2 consists of 1.7 km (1.1 mi) of Lone Tree Creek. Includes T13N R67W, NW4 Sec. 31; downstream to NE4SW4 Sec. 31.

(iii) **Note:** Unit 7 (Map 7) follows:



* * * * *

Dated: December 29, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 05–239 Filed 1–10–05; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Tuesday,

January 11, 2005

Part III

Environmental Protection Agency

40 CFR Part 82

Protection of Stratospheric Ozone: Leak Repair Requirements for Appliances Using Substitute Refrigerants; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–7858–7]

RIN 2060–AM05

Protection of Stratospheric Ozone: Leak Repair Requirements for Appliances Using Substitute Refrigerants

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is amending the rule on mandatory leak repair of appliances, promulgated under section 608 of the Clean Air Act (CAA or Act), to clarify how the requirements of section 608 extend to appliances using substitutes for chlorofluorocarbon (CFC) and hydrochlorofluorocarbon (HCFC) refrigerants. This final rule affects the owners and operators of comfort cooling, commercial refrigeration, and industrial process refrigeration (IPR) appliances with regard to leak repair provisions promulgated under section 608 of the Act. Certain aspects of this action will also affect Federal owners and operators of commercial and comfort-cooling appliances normally containing more than 50 pounds of refrigerant. This rule supplements a statutory and self-effectuating prohibition on venting substitutes to the atmosphere that became effective on November 15, 1995 (*i.e.*, section 608(c)(2) of the Act). EPA is amending the current leak repair requirements for refrigeration and air-conditioning equipment (*i.e.*, appliances) containing CFC and HCFC refrigerants to accommodate the proliferation of new refrigerants on the market. In addition to amending the leak repair requirements, this final rule extends the leak repair provisions of section 608 to appliances using substitutes consisting in whole or in part of a class I or class II ozone-depleting substance (ODS).

DATES: This final rule is effective on March 14, 2005.

ADDRESSES: Materials related to this rulemaking are contained in EPA Office of Air and Radiation (OAR) Docket OAR–2003–0167. Docket OAR–2003–0167 is the electronic version of the legacy OAR Docket No. A–92–01. All documents in the docket are listed in the docket index. Although listed in the index, some information is not publicly available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available in hard copy at the OAR Docket at Room B108, 1301 Constitution Ave., NW.; Washington, DC, 20460. This Docket Facility is open from 8 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Information concerning this rulemaking should be forwarded to Julius Banks; U.S. Environmental Protection Agency; Global Programs Division-Stratospheric Program Implementation Branch; Mail Code 6205–J; 1200 Pennsylvania Avenue, NW.; Washington, DC 20460. The Stratospheric Ozone Information Hotline (800–296–1996) and the Ozone Web page, *http://www.epa.gov/ozone,* can also be reached for further information.

SUPPLEMENTARY INFORMATION: The contents of this action's preamble are listed in the following outline:

I. General Information

A. Does This Action Apply to Me?

Entities potentially regulated by this action include those who own, operate, maintain, service, or repair comfort cooling, commercial refrigeration, and industrial process refrigeration appliances. Regulated entities include:

Category	Examples of regulated entities
Industry	Technicians who service, maintain, repair, air-conditioning and refrigeration equipment. Owners and operators of comfort cooling, commercial refrigeration, and industrial process refrigeration equipment.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated and potentially affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your company is regulated by this action, you should carefully examine the applicability

criteria contained in section 608 of the CAA Amendments of 1990. The applicability criteria are discussed below and in regulations published on December 30, 1993 (58 FR 69638). If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How Can I Get Copies of Related Information?

1. Docket

EPA has established an official public docket for this action at OAR Docket ID No. OAR–2003–0167. The official public docket consists of the documents specifically referenced in this action and other information related to this action. Hard copies of documents related to previous refrigerant recycling and emissions reduction rulemakings and other actions may be found in legacy EPA Air Docket ID No. A–92–01. The public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The public docket is available for viewing at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Air and Radiation Docket is (202) 566–1742. EPA may charge a reasonable fee for copying docket materials.

2. Electronic Access

An electronic version of the public docket is available through EPA's electronic public docket and comment system, ''EPA Dockets.'' You may use EPA Dockets at *http://www.epa.gov/edocket* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

II. Overview

Effective November 15, 1995, section 608(c)(2) of the Act prohibits the knowing venting, release, or disposal of any substitute for CFC and HCFC refrigerants by any person maintaining, servicing, repairing, or disposing of air-conditioning and refrigeration equipment. This prohibition applies unless EPA determines that such venting, releasing, or disposing does not pose a threat to the environment.

On June 11, 1998, EPA proposed (63 FR 32044) to strengthen the existing leak repair requirements for commercial, comfort cooling, and industrial process refrigeration (IPR) appliances containing CFCs and HCFCs. Tightening of the leak rates was proposed because EPA believed that manufacturer design changes have lowered achievable leak rates. EPA also proposed to extend the leak repair requirements to appliances using substitutes that the Agency did not propose to exempt from the statutory venting prohibition (*i.e.*, hydrofluorocarbon (HFC) and perfluorocarbon (PFC) substitutes).

Today's final rule clarifies how the leak repair requirements apply to substitutes for class I and class II ODSs. Today's final rule also extends the leak repair requirements to appliances containing HFC blends that contain an ODS. However, today's rule does not finalize the proposals to tighten the existing leak repair trigger rates or extend the leak repair requirements to substitutes that do not contain an ODS.

A. Section 608 of the Clean Air Act

Section 608 of the CAA requires EPA to establish a comprehensive program to limit emissions of ozone-depleting refrigerants. Section 608 also prohibits the knowingly venting or otherwise knowingly release or disposal of ozone-depleting refrigerants and their substitutes during the maintenance, service, repair, or disposal of air-conditioning and refrigeration appliances.

Section 608 is divided into three subsections. In brief, the first, section 608(a), requires EPA to promulgate regulations to reduce the use and emission of class I substances (*i.e.*, CFCs, halons, carbon tetrachloride, and methyl chloroform) and class II substances (HCFCs) to the lowest achievable level, and to maximize the recycling of such substances. Second, section 608(b) requires that the regulations promulgated pursuant to subsection (a) contain requirements for the safe disposal of class I and class II substances. Finally, section 608(c) establishes self-effectuating prohibitions on the knowingly venting, release or disposal into the environment of any class I or class II substances, and eventually their substitutes, during servicing and disposal of air-conditioning or refrigeration appliances.

Section 608(a) provides EPA authority to promulgate the requirements in today's rule. Section 608(a) requires EPA to promulgate regulations regarding use and disposal of class I and II substances to ''reduce the use and emission of such substances to the lowest achievable level'' and ''maximize the recapture and recycling of such substances.'' Section 608(a) further provides that ''such regulations may include requirements to use alternative substances (including substances which are not class I or class II substances) * * * or to promote the use of safe alternatives pursuant to section [612] or any combination of the foregoing'' EPA's authority to promulgate regulations regarding use of class I and II substances (including requirements to use alternatives) is sufficiently broad to include requirements on how to use alternatives.

Section 608(c) provides in paragraph (1) that, effective July 1, 1992, it is ''unlawful for any person, in the course of maintaining, servicing, repairing, or disposing of an appliance or industrial process refrigeration, to knowingly vent or otherwise knowingly release or dispose of any class I or class II substance used as a refrigerant in such appliance (or industrial process refrigeration) in a manner which permits such substance to enter the environment.'' The statute exempts from this prohibition ''[d]e minimis releases associated with good faith attempts to recapture and recycle or safely dispose'' of a substance. To implement and enforce the venting prohibitions of this section, EPA through its regulations interprets releases to meet the criteria for exempted *de minimis* releases when they occur while the recycling and recovery requirements of sections 608 and 609 regulations are followed (§ 82.154(a)).

EPA is promulgating leak repair regulations to implement and clarify the requirements of section 608(c)(2), which extends the prohibition on venting to substitutes for CFC and HCFC refrigerants. These regulations also carry out its mandate under section 608(a) to minimize emissions of ozone-depleting substances to the lowest achievable level.

B. Notice of Proposed Rulemaking (NPRM) Regarding Recycling of Substitutes for CFC and HCFC Refrigerants

On June 11, 1998, EPA published an NPRM (63 FR 32044) outlining requirements for substitutes for CFC and HCFC refrigerants. In that notice, EPA proposed regulations under section 608 of the Act to amend the leak repair requirements and reporting and recordkeeping requirements of 40 CFR part 82, subpart F (promulgated under section 608 of the Act).

In the NPRM, EPA proposed to extend the leak repair requirements for ozone-depleting CFC and HCFC refrigerants to substitutes including pure and blended HFC and PFC substitutes. The proposal would have required owners or operators of appliances with substitute refrigerant charges greater than 50 pounds to repair leaks, and in some cases retrofit or replace appliances, when the applicable annual leak repair rate was exceeded. Based on improvements in equipment design and maintenance that have reduced leak rates, EPA also proposed to reduce the maximum allowable leak rates for appliances containing more than 50 pounds of refrigerant. The proposal would have also extended the proposed lower leak rate to appliances using substitutes.

The NPRM asked for public comment on the Agency's proposals and on the rationale behind them. The Agency received 167 public comment letters (comments) in response to all aspects of the NPRM. In general, most commenters recognized the need for mandatory recovery of substitutes in order to help protect the ozone layer and to provide a source of refrigerant to service existing capital equipment after the phaseout of CFC and HCFC refrigerant production is complete. The majority of commenters believed that the proposed amendments would clarify the refrigerant regulations, but many expressed concerns over the regulation of refrigerants that do not deplete the ozone layer.

Today's final rule addresses the public comments received in response to the proposed rule as they relate to the leak repair requirements. Other aspects of the final rule, specifically, the applicability of the venting prohibition and the refrigerant sales restriction were addressed in a separate final rulemaking (69 FR 11946; March 12, 2004). The proposed requirements for the certification of refrigerant recovery/recycling equipment will be addressed in a separate rulemaking.

III. Final Rule

A. Overview

On March 12, 2004 (69 FR 11946), EPA published a final rule extending a number of the required practices at § 82.156 to substitutes consisting of an ODS. These changes were intended to accommodate the growing number of refrigerants, including newer blended HFC/HCFC substitutes that are subject to the regulations because they consist of a class II ODS. Such changes included the adoption of evacuation requirements based solely on the saturation pressures of refrigerants, the requirement for service apertures on appliances, and mandatory certification of service technicians.

In this rule, EPA did not finalize the proposal to extend all of the regulations concerning emissions reduction of CFC and HCFC refrigerants, at 40 CFR part 82, subpart F, to pure HFC and PFC substitutes. The rule did not mandate any of the following proposed requirements from the NPRM: a sales restriction on HFC or PFC substitutes that do not consist of an ODS; specific evacuation levels for servicing appliances containing HFC or PFC substitutes that do not consist of an ODS; certification of recycling and recovery equipment intended for use with appliances containing HFC or PFC substitutes that do not consist of an ODS; certification of technicians who maintain, service, or repair appliances containing HFC or PFC substitutes that do not consist of an ODS; reclamation requirements for used HFC or PFC substitutes that do not consist of an ODS; certification of refrigerant reclaimers who reclaim only HFC or PFC substitutes that do not consist of an ODS; or leak repair requirements for appliances containing more than 50 pounds of HFC or PFC substitutes that do not consist of an ODS.

Today's final rule amends the leak repair regulations at subpart F covering CFC and HCFC refrigerants, and extends these requirements to owners or operators of appliances containing substitutes that consist of a class I or class II ODS. EPA is finalizing the proposed amendments to the leak repair requirements at § 82.156(i), the associated recordkeeping provisions at § 82.166(n) and (o), the definition of ''full charge'' at § 82.152; and adding a definition for ''leak rate'' at § 82.152. EPA also describes compliance scenarios to address inquiries concerning whether or not leaks that occur after repairs have been completed and all applicable verification tests have been successfully performed are considered a new leak occurrence for the appliance.

EPA is not finalizing the proposal to extend the leak repair requirements to owners or operators of appliances using HFC or PFC substitutes that do not contain a class I or class II ODS. The Agency is not finalizing the proposal (63 FR 32066; June 11, 1998) to lower the permissible leak rates for air-conditioning and refrigeration appliances containing more than 50 pounds of an ODS refrigerant or to extend these requirements to appliances using HFC and PFC substitutes.

B. Definitions

1. Full Charge

Compliance with the leak repair requirements requires calculating both the full charge of the appliance and the leak rate. EPA has previously defined full charge at § 82.152 as the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one or a combination of the four methods specified at § 82.152. In the NPRM, EPA proposed to eliminate the phrase ''for the purposes of § 82.156(i)'' and the word ''all'' from paragraph (2) in the definition of full charge at § 82.152.

EPA did not receive any comments concerning the removal of the phrase ''for the purposes of § 82.156(i)'' and the word ''all'' from paragraph (2) in the definition of full charge at § 82.152. EPA did receive comments on the definition of ''full charge'' that were outside of the scope of the proposed changes.

EPA received no adverse comments to the proposed editorial change; therefore, EPA is finalizing the proposal to eliminate the phrase ''for the purposes of § 82.156(i)'' and the word ''all'' from paragraph (2) in the definition of full charge at § 82.152, because the term and the phrase are implicit in that language. EPA believes that these changes will improve the readability of the provision by eliminating redundancy.

The NPRM did not propose to alter the means by which the owner or operator could determine the full charge of the appliance. The edits were proposed to add clarity to the definition without changing the means by which ''full charge'' can be determined. Owners or operators of appliances are still required to use one or a combination of the four methods to determine the full charge of appliances. Full charge means the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one of the following four methods or a combination of one of the following four methods:

(1) The equipment manufacturers' determination of the correct full charge for the equipment;

(2) Determining the full charge by appropriate calculations based on component sizes, density of refrigerant, volume of piping, and all other relevant considerations;

(3) The use of actual measurements of the amount of refrigerant added or evacuated from the appliance; and/or

(4) The use of an established range based on the best available data, regarding the normal operating characteristics and conditions for the

appliance, where the midpoint of the range will serve as the full charge, and where records are maintained in accordance with § 82.166(q).

Hence EPA has provided flexibility in determining the full charge for appliances under ''normal operating characteristics.'' The onus is on the owner or operator of the appliance to determine the full charge by using one or a combination of the four methods listed in the definition of full charge at § 82.152. The leak rate then determines what actions are required by the appliance owner or operator in order to remain in compliance with the leak repair requirements of § 82.156.

2. Leak Rate

EPA has not previously promulgated a formal definition for leak rate. In the NPRM, EPA proposed to define leak rate for the purposes of applying leak repair requirements in § 82.156(i) for industrial process refrigeration, comfort cooling and commercial appliances. EPA proposed to add a definition in the regulations for clarity, and to address some of the issues raised by the regulated community concerning calculating leak rates in order to comply with the leak repair requirements contained in § 82.156(i).

EPA and the Chemical Manufacturers' Association (CMA) jointly issued a compliance guide for leak repair in October 1995. That guide, known as the Compliance Guidance for Industrial Process Refrigeration Leak Repair Regulations Under Section 608 of the Clean Air Act (Compliance Guidance), includes a section on calculating leak rates. The Compliance Guidance states that each time the owner or operator adds refrigerant to an appliance normally containing 50 pounds or more of refrigerant, the owner or operator should promptly calculate the leak rate to ensure that the appliance is not leaking at a rate that exceeds the applicable allowable leak rate. If the amount of refrigerant added indicates that the leak rate for the appliance is above the applicable allowable leak rate, the owner or operator must perform corrective action by repairing leaks, such that appliances do not continue to leak above the applicable leak rate, retrofitting the appliance, or retiring [1] the appliance in accordance with the requirements of § 82.156(i).

The Compliance Guidance specifically mentions two methods for calculating leak rates. The first method is referred to as the ''annualizing method,'' because it takes the quantity of refrigerant (percentage of charge) lost between charges and scales it up or down to calculate the quantity that would be lost over a year-long period. This method is described in the Compliance Guidance as follows:

(1) Take the number of pounds of refrigerant added to the appliance to return it to a full charge and divide it by the number of pounds of refrigerant that the appliance normally contains at full charge;

(2) take the number of days that have passed since the last day refrigerant was added and divide by 365 days;

(3) take the number calculated in step (1) and divide it by the number calculated in step (2); and

(4) multiply the number calculated in step (3) by 100 to calculate a percentage.

EPA's section 608 annualizing method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added}}{\text{pounds of refrigerant in full charge}} \times \frac{\text{365 days/year}}{\text{shorter of: \# days since refrigerant last added or 365 days}} \times 100\%$$

The second method for calculating leak rates discussed in the Compliance Guidance is the ''rolling average'' method. The term ''rolling average'' is not defined in the Compliance Guidance, but EPA proposed (63 FR 32057) to calculate it by:

(1) Taking the sum of the quantity of refrigerant added to the appliance over the previous 365-day period (or over the period that has passed since leaks in the appliance were last repaired, if that period is less than one year);

(2) dividing the result of step one by the quantity (*e.g.*, pounds) of refrigerant the appliance normally contains at full charge; and

(3) multiplying the result of step two by 100 to obtain a percentage.

EPA's section 608 rolling average method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added over past 365 days (or since leaks were last repaired, if that period is less than one year)}}{\text{pounds of refrigerant in full charge}} \times 100\%$$

In the NPRM, EPA considered four options for the formal definition of ''leak rate.'' The first option was to require appliance owners or operators to calculate leak rates using only the ''annualizing'' method. The second proposed method was to exclusively use EPA's Rolling Average Method. The third proposed method was to use whichever method yielding the highest leak rate. The forth proposed method was to allow appliance owners or operators to use either method of their choosing provided the same method is used consistently for all appliances located at the facility. Discussion of the comments and EPA's decision on these options are detailed below.

a. Comments on Option 1—Use of Annualizing Method

The first proposed option requiring owners or operators to exclusively use the annualizing method received support from commenters, but with some concern. Commenters generally expressed a comfort level with the annualizing method, and consistently noted its acceptance by CMA and EPA. However, several commenters expressed

[1] EPA considers retirement of an appliance as an action to permanently remove the appliance from operation.

concern over the projection of the leak rate over a 12-month period. A trade group representing the commercial food sector expressed concern that the proposed leak rate definition generates a total representing an amount that would have been lost per 12-month period had the leak(s) not been repaired rather than the amount of refrigerant actually released in each instance prior to repair.

The proposed annualizing method does include the actual amount of refrigerant added to the appliance in its calculation of the leak rate, but projects or ''annualizes'' the leak rate by considering the amount of time that has passed between refrigerant charges. EPA understands commenters' concerns. For instances where owners or operators have leaking appliances that continue to require addition of refrigerant, the annualizing method may result in a higher leak rate than other possible calculations that fail to annualize over a 12-month period, by looking at the leak as a one time event and a simple ratio of refrigerant added versus the full charge. Taking such an approach would allow for continued patterns of repair attempts followed by refrigerant recharge and subsequent release. Such a pattern is not viewed by EPA as advantageous to the environment since the total amount of refrigerant release is compounded over time. The leak repair amendments are aimed at preventing such patterns and requiring owners or operators to sufficiently repair or replace/retrofit appliances that cannot be sufficiently repaired.

EPA believes that the first method (*i.e.*, exclusive use of the annualizing method) has the advantage of being relatively simple and familiar. As a result of the compliance guidance, EPA believes that many owners or operators are familiar with the method and have incorporated the methodology into their manual and computerized refrigerant tracking systems and standard operating procedures dealing with repair of refrigerant leaks. However, EPA believes that the preferred approach is to provide appliance owners or operators with greater flexibility in calculating the ''leak rate.'' Hence EPA is not mandating exclusive use of the annualizing method in defining the leak rate.

b. Comments on Option 2—Use of EPA's Rolling Average Method

Commenters were generally opposed to the second proposed option that requires owners or operators to calculate leak rates using only the ''rolling average'' method, because they believed it resulted in elevated leak rates when compared to calculating the leak rate with the annualizing method. Commenters stated that under this method owners of such appliances may be required to repair an appliance that has actual leak rates below accepted limits. As examples, commenters cautioned: (1) That the proposed formula would artificially elevate the leak rates on appliances with large reserve capacity; and (2) that if the number of days since refrigerant was last added to the system is more than 365 days, the percent leak rate is artificially elevated, and may require a system to be repaired when there may be no substantial leak. An additional commenter noted that while the compliance guidance mentions the ''rolling average'' method, it was not defined until the NPRM proposed a definition which may have caused some inconsistency between industry practice and the proposed definition.

Several commenters expressed concern over the Agency's use of 365 days in the proposed option to include the rolling average method in the definition of leak rate. Commenters stated their interpretation that in order for the rolling average method to work, the last time refrigerant was added to a system has to be less than 365 days. They also stated that in order to calculate a true leak rate the operator must know both how much refrigerant was lost and over what period of time that loss occurred. One commenter stated that the time period must always equal the interval between the realization of a leak and the last time refrigerant was added in order to restore the system to its normal operating charge, thus making the number 365 useless. Several commenters objected to the rolling average method based on their understanding that the calculation assumes that all leaks have occurred within the past 365 days. The commenters stated that leak repairs occur whenever operators find them, not on a set schedule (*e.g.*, every 365 days). Commenters also stated that appliances with large reserve capacities could be negatively impacted since the full charge may not coincide with the operating charge.

EPA believes that the second method (*i.e.*, exclusive use of the rolling average method) is relatively simple and catches certain leaks (such as the sudden fast leak described in the previous paragraph) more quickly than the annualizing method. The disadvantage of the rolling average method is that it permits owners or operators to delay repair of certain types of leaks longer than the annualizing method and may not show that appliances are leaking until they have lost a relatively large percentage of charge; however, EPA does not find that this method artificially inflates leak rates for appliances with large reserve capacities. Appliance owners or operators have four options to determine the full charge and have opportunity to take reserve amounts under consideration when determining the full charge.

EPA is not requiring owners or operators to determine the amount of refrigerant that has leaked from the appliance since the last repair, but the owner or operator must determine how much refrigerant has been added to the system within the past 12-month period or the number of days since refrigerant was last added in order to calculate the leak rate using the rolling average method. The time period of 365 days is meant to cover all additions of refrigerant to the appliance over a consecutive 12-month period, and does not imply that leaks only occur once per year or on any particular schedule. EPA is aware that many owners or operators repair appliances as soon as they realize that the appliance is not functioning properly; however, the goal of the leak repair requirements is to require owners or operators to take action on chronic leakers that require repair on a frequent basis. The 365-day time frame has significance, because it ''annualizes'' the leak rate of the appliance over a consecutive 12-month period, and requires operators and owners or operators to take action to repair, retrofit, or replace leaking appliances.

In the NPRM, EPA noted that the second option was not preferable but wished to provide notice and comment on the proposed options for the definition of ''leak rate.'' Based in part upon comments received, and the Agency's desire to provide more flexibility to owners or operators in determining leak rates, EPA has decided to not finalize the second option requiring exclusive use of the ''rolling average'' in calculating the leak rate.

c. Comments on Option 3—Use of the Method Yielding the Highest Leak Rate

EPA noted in the NPRM (63 FR 32058) that the third option, requiring use of whichever method yields the higher calculated leak rate, was its preferred option. This option is a more complicated approach (both for compliance and enforcement) than requiring the use of either method alone, but ensures that leaks are caught and addressed as quickly as possible.

Commenters were generally opposed to the proposed third option of calculating leak rates by whichever method yielded a higher leak rate,

because it would be more burdensome on equipment owners or operators and EPA enforcement personnel because it requires facilities to calculate leak rates using both methods and maintain supporting documentation for both. Several commenters felt that if EPA were to finalize this option, that the Agency should provide multiple formula choices, thereby making the regulation more workable for business while allowing the Agency to meet its objective of reducing leaks.

EPA is not finalizing the third proposed method for calculating the annual leak rate. EPA believes that the third proposed method does not provide a level of flexibility that is warranted for diverse appliances used in the commercial and IPR sectors. EPA has reconsidered the possible burden placed upon owners or operators who would be required to calculate leak rates using both methods and maintain records on both of the methods used to calculate leak rates. The enforcement of such a requirement would also be more difficult as EPA enforcement personnel would have to review multiple leak repair methods for different appliances located at the same facility. Therefore, EPA is not finalizing the third proposed method for calculating the annual leak rate. However, EPA is not opposed to considering additional methodologies for calculating or defining the leak rate, and may propose alternative methodologies in future rulemakings.

d. Comments on Option 4—Owners or Operators Leak Rate Method of Choice

The fourth option proposed to permit owners or operators to calculate leak rates using either method, so long as the same method is always used for the same appliance, facility, or firm. While the majority of commenters preferred the fourth option over the other three options, a few commenters objected to the specification of a method for calculating annual leak rates and argued that the Agency's method for calculating leak rates should be revised to allow owners and operators of the equipment to use any method that is technically sound and consistently used for determining annual leak rates. The commenter noted that this would address situations where the EPA/CMA methods do not permit the accurate determination of leak rates. One commenter believed that the Agency should provide two or three formula choices, which would make the regulation more workable for business and allow the Agency to meet its objective of reducing leaks. The commenter stated that appliance owners and operators have economic and quality control incentives to monitor and control leaks and should be afforded maximum flexibility in calculating leak rates to ease and facilitate compliance. Another commenter noted that if employed, this method should not require use of the same method beyond the site or facility, since such a requirement could lead to the disruption of established programs.

EPA did not propose additional methods of calculating the leak rate for incorporation into the proposed definition at § 82.152. EPA emphasizes that the onus is on the owner or operator of the appliance to determine the leak rate (as defined at § 82.152) upon addition of refrigerant. If they fail to do so, owners or operators would have no way of knowing what actions are required to remain in compliance with the leak repair requirements.

EPA finds that while permitting appliance owners or operators to select either of the two methods of their choice to calculate the leak rate is somewhat more complicated, but could be easier for owners or operators to comply with if they have more experience with one method than the other. Both the annualizing and rolling average methods eventually catch all leaks above the maximum allowable rate. Because appliance owners or operators using the rolling average method would be doing so at their discretion, this approach neutralizes any equity concerns associated with that method. EPA believes that this option provides flexibility to owners or operators of appliances and permits them to choose whichever method they prefer. Furthermore, this option addresses any concerns about ambiguity or inconsistencies concerning the inclusion of the term ''rolling average'' in the definition of leak repair and owners or operators are likely to have more experience with one method than the other. Both the annualizing and the EPA's rolling average methods catch all leaks above the maximum allowable rates. While EPA prefers the use of the annualizing method, this fourth option allows owners and operators to use the method of their choice and neutralizes any equity concerns associated with either method.

Therefore, with this action, EPA is defining leak rate using the fourth option which allows appliance owners or operators to use either of the two methods of their choice, provided the option chosen is used consistently for calculating leak rates for the lifetime of all appliances located at an operating facility that are subject to the leak repair requirements. EPA is also requiring the owner or operator to promptly calculate the leak rate each time an owner or operator adds refrigerant to a system normally containing more than 50 pounds of refrigerant.

C. Required Practices for Leak Repair

In the NPRM, EPA proposed to lower the permissible leak rates for some air-conditioning and refrigeration appliances containing more than 50 pounds of CFC and HCFC refrigerant. EPA also proposed to extend the leak repair requirements (as they would be amended) to air-conditioning and refrigeration appliances containing more than 50 pounds of HFC and PFC substitutes.

EPA proposed to lower the permissible annual leak rate for new commercial refrigeration appliances to 10 percent of the charge per year, the permissible annual leak rate for older commercial refrigeration appliances to 15 percent per year, the permissible annual leak rate for some IPR appliances to 20 percent of the charge per year, the permissible annual leak rate for other new appliances (*e.g.*, comfort cooling chillers) to 5 percent of the charge per year, and the permissible annual leak rate for other existing comfort cooling appliances to 10 percent of the charge per year.

1. Comfort Cooling Appliances

EPA proposed to lower the leak rates based on indications from appliance manufacturers that reductions in leak rates have been most dramatic in comfort cooling chillers, where leak rates have been lowered from between 10 and 15 percent per year to less than 5 percent per year in many cases. In the NPRM, EPA noted that based on information provided by equipment manufacturers that design changes and leak detection technologies warranted the proposal to lower leak rates. EPA referenced several design changes, such as installation of high-efficiency purge devices on low-pressure chillers, the installation of microprocessor-based monitoring systems that can alert system operators to warning signs of leakage (such as excessive purge run time), the use of leak-tight brazed rather than leak-prone flared connections, and the use of isolation valves, which permit technicians to make repairs without evacuating and opening the entire refrigerant circuit. In addition, EPA noted that the reported leak rates for new chillers all fall below 5 percent with the exception of the open-drive type of high pressure chiller which has reported leak rates between 4 and 7 percent. EPA requested comment on whether EPA should set a larger leak rate for this type of chiller.

The majority of commenters were opposed to any effort to tighten the existing leak rates for comfort cooling appliances. Several commenters supported lower permissible leak rates for comfort cooling appliances containing more than 50 pounds of refrigerant, but only to a 20–25%. Several commenters opposed applying more stringent leak repair rates to older appliances, noting that the proposed leak rates (63 FR 32066) would be feasible only for some primary systems associated with secondary fluid systems and would not be feasible for most comfort cooling appliances. Another commenter claimed that the Agency failed to provide any facts to support a finding that the regulated community could locate and detect the small leaks. The commenter felt that at a permissible leak rate of 5 percent, small and perhaps undetectable leaks would become significant since they may result in an appliance leaking above the proposed 5 percent leak rate.

Some commenters requested that the Agency consult with appliance owners or operators to determine if their experiences confirm original equipment manufacturers' claims on the leak tightness of newer refrigeration and air-conditioning systems before finalizing tighter leak rates that may not be practical. The commenter suggested that separate leak rate criteria be created for new site-assembled refrigeration units and chillers versus such equipment assembled in factories.

Several commenters stated that more stringent rates for older appliances would cause financial and operational burdens on owners or operators, partially because many older systems were not designed to accommodate devices that reduce emission losses to the proposed level. Specifically, medium and high-pressure appliances for which retrofit high-efficiency purge systems are not available were of particular concern. One commenter suggested that lowering the permissible leak rate for newer comfort cooling units to 5 percent goes beyond the ''lowest achievable level'' of emissions reductions required by § 608(a)(3)(A). The commenter pointed out that as these new units age, their leak rates will inherently increase.

In response to comments EPA notes that the intent of the leak repair regulations is to require owners or operators to maintain appliances over their life-span. EPA recognizes that these appliances may leak with greater frequency as they age. By promulgating these regulations, EPA intends to minimize refrigerant releases by requiring owners or operators to take actions to maintain appliances as they age or retire or replace inherently leaking appliances. Replacement of leaking appliances has the benefit of use of newer appliances that in general tend to have lower refrigerant charges and fewer leak occurrences. These efforts insure that refrigerant emissions are minimized to the lowest achievable level, in accordance with section 608 of the Clean Air Act.

EPA believes that additional data on historical repair trends and leak tightness of comfort cooling appliances are warranted prior to lowering the leak rates. EPA intends to initiate efforts to gather data on the availability and effectiveness of current leak detection methods and equipment prior to amending the leak repair trigger rates. Therefore, as a part of today's action, EPA is not finalizing the proposal to lower the permissible leak rates for comfort cooling appliances containing more than 50 pounds of refrigerant to 5 and 10 percent of the charge per year for new and existing appliances, respectively.

2. Commercial Refrigeration

In the NPRM, EPA proposed that the maximum permissible leak rate for new commercial refrigeration equipment (commissioned after 1992) be lowered to 10 percent per year, and that the maximum rate for old commercial refrigeration equipment (commissioned in or before 1992) be lowered to 15 percent per year.

EPA based the proposal to lower the leak rate in part on a study sponsored by EPA's Office of Research and Development (ORD). The ORD study analyzed two detailed bodies of data on leakage from commercial refrigeration equipment, one collected by a Midwestern chain of 110 stores and the other gathered by the South Coast Air Quality Management District (SCAQMD), which requires monitoring and reporting of leak rates from large refrigeration systems. The Midwestern chain achieved an average leak rate of 15 percent by establishing written procedures for equipment installation (including a requirement for brazed or ''sweated'' expansion valves), a refrigerant monitoring system, and an equipment inspection protocol. This rate was achieved in 1992, before EPA's leak repair requirements were even in effect. The data collected by SCAQMD was based upon 440 recharging and leak testing events from 56 different stores representing 20 different businesses. The average leak rate achieved by the stores was eight (8) percent of the total charge.

The ORD report also investigated the cost-effectiveness of different strategies and technologies for reducing leak rates, finding that many of these approaches could lower leak rates significantly and thereby pay for themselves. The report indicated that by using a combination of these approaches, a number of chains had significantly reduced both overall refrigerant consumption and leakage from equipment over the previous two to eight years. Some of the most effective approaches included vibration elimination devices, use of high-quality brazed rather than mechanical connections, low emission condensers, stationary leakage monitors, refrigerant tracking and improved preventive maintenance. A few of the approaches, such as installation of low-emission condensers, were more applicable to new than to existing appliances; however, many of the approaches, such as refrigerant monitors, refrigerant tracking systems, and improved preventive maintenance, were applicable to both existing and new appliances. According to the report, these approaches were individually expected to reduce leak rates from appliances by between 5 and 40 percent of the charge per year.

EPA requested comment on the proposed rates, and whether the relatively low leak rates observed in new equipment are likely to persist throughout its lifetime, or whether those rates are likely to rise over its lifetime to approach the current leak rates of older equipment. EPA also requested comment on whether higher or lower rates might be appropriate for different types of commercial refrigeration equipment, given that compressor rack systems, single compressor systems, and self-contained units may have significantly different average leak rates. Finally, EPA requested comment on whether significant percentages (*e.g.*, 10 percent or more) of the various types of commercial refrigeration equipment may be able to comply with leak rates of 10 or 15 percent without being totally replaced, and, if this is the case, whether permissible leak rates of 15 and 20 percent might be more achievable.

In general, commenters were opposed to the proposed reduction in the maximum permissible leak rate for commercial refrigeration appliances. Commenters were concerned that the two studies used to set the new leak rates for commercial refrigeration units with charges greater than 50 pounds excluded small businesses and ignored the differences between new and old equipment. One commenter stated that the two studies cited by the Agency do not show that all refrigeration systems

can achieve the proposed leak rates, nor do they show that any regulatory requirements are needed. The commenter noted that the study did not comprise a statistically significant sample, and the information from these studies would apply to only a limited subset of existing and future refrigeration systems. Another commenter stated that the case studies referenced in the study summarize anecdotal and limited data by concentrating on best management practices to reduce maintenance costs instead of the ability for grocers to adhere to the proposed lower leak rates. The commenter stated that the NPRM would also have negative financial implications upon small independent grocers.

Commenters stated that, leaks occur at seals and O-rings and are the result of normal wear, tear, stress, and vibration. The commenter noted that due to the nature of the commercial sector that grocers become aware of such leaks almost immediately because the equipment owner faces the cost of replacing lost refrigerant and the loss of perishable goods. Commenters also stated that depending on store design, leak detection can be costly, difficult, and sometimes labor intensive. Commenters stated that EPA should not attempt to dictate the type of commercial appliance used (*e.g.*, open-drive compressors or direct expansion systems rather than hermetic compressors and secondary loop systems) in order to justify lowering the leak rates.

EPA received comment that tightening of leak rates for the commercial sector would negatively impact small independent grocers. Commenters noted that the life expectancy of a refrigerant case is typically 20–25 years and argued that the rule will require many independent grocers to purchase new commercial refrigeration equipment to lower their annual leak rates to comply with the new requirements. A commenter explained that for those grocers still legally using older CFC-based equipment, that it may be impossible to attain a 10 or 15 percent leak rate. The only viable options would be for the grocers to either close or purchase new equipment.

EPA acknowledges that neither of the studies differentiated between new and old appliances. The cited studies include in their analyses commercial refrigeration appliances that are commonly available in the commercial sector. EPA does not believe that the type of appliance available and covered under the leak repair regulations differs depending on the classification of the business owner as an independent grocer. According to commenters, smaller independent grocers may rely on older appliances, but EPA does not find a persuasive rationale to allow older appliances to continue to leak at high rates because they are aging. EPA agrees that owners or operators of commercial refrigeration appliances have an economic incentive to repair leaks as soon as they are discovered. However, EPA finds that continued patterns of repair attempts followed by refrigerant recharges are not optimal for environmental protection. This is especially true for appliances that may be described as ''chronic leakers.'' The intent of the leak repair regulations is to require owners or operators to sufficiently repair appliances (especially as appliances age) so that they will not develop a history of leak events, or retrofit or replace appliances that cannot be sufficiently repaired. EPA is not mandating the use of any specific leak detection equipment, but believes that the use of detection equipment is one means of preventing loses resulting in extensive repair and use of ozone-depleting refrigerants, in both older and newer appliances.

EPA believes that additional data on historical repair trends and leak tightness of commercial refrigeration appliances is warranted prior to lowering the leak rates. EPA intends to initiate efforts and seek cooperation from organizations representing the commercial refrigeration sector to gather data on the availability and effectiveness of current leak detection methods and equipment prior to amending the leak repair trigger rates. Therefore, as a part of today's action, EPA is not finalizing the proposal to lower the permissible leak rates for commercial appliances containing more than 50 pounds of refrigerant.

Since EPA is not finalizing a lowering of the leak rate, there is no need to finalize the proposal of a two-tier leak rate based upon the date of manufacture, compressor configuration, and possession (or lack) of a secondary loop in determining maximum allowable leak rates. The Agency may address the proposal to lower the applicable leak repair trigger rates by reproposing, in a future NPRM, a lower leak rate for commercial refrigeration appliances.

3. Industrial Process Refrigeration (IPR)

The conditions that contribute to a wide range of leak rates in the commercial refrigeration sector apply even more to the industrial process refrigeration sector. Appliances in the industrial process refrigeration sector are not only assembled on-site, but are often custom-designed for a wide spectrum of processes and plants, giving the sector an extraordinarily broad range of appliance configurations and designs. Appliances may be high-or low-pressure; may possess hermetic, semi-hermetic, or open-drive compressors; may use one (primary) or two (primary and secondary) refrigerant loops; maybe brand new or decades old; and may range in charge size from a few hundred to more than 100,000 pounds of refrigerant. All of these factors are important in determining leak rates, leading to a wide range of attainable leak rates.

In the NPRM, EPA stated that industrial process refrigeration equipment built more recently has generally been designed to leak less than equipment built earlier. Thus, EPA proposed to consider the date of manufacture, compressor configuration, and possession (or lack) of a secondary loop in determining maximum allowable leak rates for industrial process refrigeration appliances. The proposal did not include provisions for higher leak rates for appliances with very large charge sizes, because a given leak rate in large appliances causes more environmental harm than the same leak rate in small appliances. For example, a 20 percent annual leak rate in an appliance with a 10,000 pound charge would result in the release of 2,000 pounds of refrigerant per year, while a 20 percent annual leak rate in an appliance with a 1,000 pound charge would result in the release of 200 pounds of refrigerant per year. Although it may be more difficult or expensive to achieve a given leak rate in large appliances than in small appliances, EPA believed that these additional efforts were warranted by the larger environmental impact of leaks from large appliances. In view of these considerations, EPA proposed different maximum permissible leak rates based on the appliance's date of manufacture, compressor configuration, and number of refrigerant loops (primary only vs. primary and secondary).

Under the proposed approach, industrial process refrigeration appliances would have been subject to a 20 percent per year maximum permissible leak rate unless it met all four of the following criteria:

(1) The refrigeration system is custom-built;

(2) The refrigeration system has an open-drive compressor;

(3) The refrigeration system was built in 1992 or before; and

(4) The system is direct-expansion (contains a single, primary refrigerant loop).

Systems that met conditions 1, 2, 3, and 4 would continue to be subject to the 35-percent-per-year maximum permissible leak rate.

The Agency requested comment on the approach, both on the criteria used to sort appliances between the 20 percent and 35 percent per year rates, and on the rates themselves. EPA specifically requested comment on whether it might be appropriate to permit a higher leak rate for appliances with a charge size above 10,000 pounds that were built before 1992. EPA also sought comment on whether it would be appropriate to use a measure other than charge size (such as pipe length) to characterize sprawling, inherently leaky appliances.

In general commenters were opposed to any effort by EPA to lower leak rates for IPR appliances. Commenters noted that refrigeration operators have already lowered leak rates as much as possible due to the high cost of refrigerant, potential cost of lost productivity, maintenance costs, and efficiency. Most commenters based their objections on a lack of sufficient valid and representative data demonstrating that the lower rates can be achieved. The commenters expressed their belief that the Agency used references to new equipment as opposed to data from actual users to arrive at the proposed permissible leak rates.

In addition, EPA requested comment on the interchangeability of equipment designs that may be more leak-tight than others. That is, the Agency wanted to know if there are compelling reasons why users of industrial process refrigeration must use open-drive compressors or direct expansion systems rather than hermetic compressors and secondary loops.

EPA received comments stating that the Agency should not require retrofitting or rebuilding of older appliances that use open-drive compressors and/or have long primary refrigerant loops, because the cost associated with rebuilding a refrigeration system to use hermetic compressors or secondary refrigerants is large. Additional comments noted several problems with requiring hermetic compressors for industrial applications. Commenters noted that maintenance takes longer and emissions are more likely, because the whole refrigerant charge has to be cleaned or replaced if the hermetic compressor motor fails. A commenter suggested that if the Agency is considering requiring hermetic (or semi-hermetic) compressors and/or secondary refrigerants, it should do so in a different rulemaking with its own proposal and comment period due to concerns over technical infeasibility (especially for lower temperature and larger manufacturing processes) and associated costs. Commenters stated that hermetic (or semi-hermetic) compressors would not necessarily always provide a large degree of emissions reductions, hence there is less certainty as to the environmental benefit of this proposed requirement.

A commenter stated that a universal requirement to use secondary refrigerants would be inappropriate. The commenter stated that suitable or compatible secondary refrigerants might not be available for a particular process. The commenter believed that switching to secondary refrigerants would be burdensome because most refrigeration systems are designed for specific primary refrigerants. According to the commenter, large portions of the system would have to be replaced at great expense to successfully switch to a secondary refrigerant.

EPA also sought comment on other possible approaches to leak repair in industrial process refrigeration equipment that could be more or less complex than the one proposed. A simple approach would lower the current permissible leak rate for all industrial process appliances to a single new rate, perhaps to 25 percent per year. A more complex approach would establish three or more permissible rates for different classes of appliances.

One commenter suggested a two-tier approach to lowering the permissible leak rate that would allow industry to select the tier which best accommodates their needs. The first tier would be a simple approach that reduces the permissible leak rate to a new lower rate (say 25–30%) that would apply to all industrial process refrigeration appliances. The second tier would be a more complex approach, namely, to distinguish between appliance types in establishing permissible leak rates.

Another commenter was concerned that the proposed permissible leak rates may be difficult to achieve without replacing the entire appliance or wholesale replacement of joints and seals. Although technically feasible, the commenter thought this would be an unreasonable requirement due to the costs associated with such replacements. The commenter suggested a more lenient acceptable leak rate to account for normal variations in leak rates between various pieces of the appliance. The commenter noted that revised regulations should take into account increasing leak rates in older appliances, higher leak rates in portable and mobile appliances, and refrigerant charging errors that may significantly distort the leak rate calculation. The commenter suggested permissible leak rates of 25 percent for commercial refrigeration, regardless of the age of the appliance, and 10–15 percent for all other appliances.

EPA also sought comment on the proposal to make the new leak rates effective for industrial process refrigeration equipment three years after promulgation for the following reasons:

1. Owners, operators, and servicers of industrial process refrigeration appliances have had less time than owners, operators, and servicers of other types of appliances to learn and implement the existing maximum permissible rates;

2. Custom-built industrial process refrigeration appliances and replacement parts take longer than other types of appliances to order, build, and repair, thus providing a rationale for a time delay between promulgation and effective date;

3. Industrial process refrigeration appliances must be shut down, at considerable expense before large repairs can be made to their refrigeration systems or before such systems can be replaced, thus providing a rationale for permitting significant lead time between the promulgation and effective date of the new leak rate.

EPA received comment supporting the effective date. Commenters stated that the use of 30 days after the publication date of the final rule would be impractical as it does not take into consideration the work load and scheduling of refrigeration contractors nor the cost and impact on the budgetary process of the appliance owner. Other commenters noted that the three-year delay would allow time for technicians to be retrained, and to help mitigate the burden and disruption associated with the change in leak rates.

EPA believes, based on the comments it received, that additional data on historical repair trends and leak tightness of industrial process refrigeration appliances are warranted prior to lowering the leak rates. EPA intends to initiate efforts to gather data on the availability and effectiveness of current leak reduction methods prior to amending the leak repair trigger rates. Therefore, as a part of today's action, EPA is not finalizing the proposal to lower the permissible leak rates for industrial process refrigeration appliances containing more than 50 pounds of CFC or HCFC refrigerant. Since EPA is not finalizing the proposal

to lower leak rates for industrial process refrigeration appliances, there will not be a corresponding three-year implementation date for the effective date of the regulations. Due to the apparent difficulties and incompatibility of hermetic compressors in the industrial process refrigeration sector, further evaluation is required prior to any Agency action considering how to incorporate the use of hermetic compressors or secondary loop systems into the leak repair regulations. The Agency may address, in a future NPRM, alternative approaches to determining the leak rate in industrial process refrigeration.

4. Cross-Sector Issues

EPA requested comment on several issues affecting all three sectors covered by the leak repair requirements. EPA requested comment on its proposal to establish a two-tier leak rate which would distinguish between old and new appliances in establishing maximum allowable leak rates based upon the date of manufacture of the appliances. EPA proposed and sought comment on the use of the year 1992 as the baseline to regulate appliances more or less stringently. EPA also requested comment on whether the environmental and economic benefits of having two leak rates would justify the increase in administrative complexity that would result from such an approach.

In proposing to establish a two-tier leak repair requirement based upon the age of appliances, EPA requested comment on whether the date of ''manufacture'' should be defined as the date that appliance leaves the factory or the date that it is installed. EPA noted that it may be appropriate to define ''manufacture'' differently for different types of appliances, because some appliances (*e.g.*, comfort cooling chillers) could be considered ''manufactured'' when they leave the factory, while appliances that are assembled in the field from numerous components (*e.g.*, commercial and industrial process refrigeration) could be considered ''manufactured'' when their installation is complete.

EPA received comments stating that the Agency should not require refrigeration equipment to continue to meet the same very low leak rates throughout the life of the equipment, because leak rates are likely to increase as the refrigeration equipment ages. One commenter noted that experience indicates that older refrigeration systems generally have higher leak rates than new ones; hence, systems do not maintain the same leak rates throughout their life span. Many common types of machinery exhibit a decline in performance as they age. The commenter cautioned that if the Agency obtains historic information on leak-tightness of refrigeration systems, it should not compare pre-rule (63 FR 32044; June 11, 1998) to post-rule data, because improvements in the leak rates of older equipment would result from the regulation going into effect, not from any improvement in that actual equipment. The commenter stated that because it is unlikely that the Agency will have historical leak-tightness data on the equipment, and because post-rule equipment has not yet completed a full life span, the Agency should not impose leak rates that the equipment may not be able to meet as it ages. The commenter stated that the Agency should provide a mechanism that permits equipment to continue to comply as it ages.

EPA concurs with the commenters in that leak rates are likely to increase as the appliances age, and believes that this is in fact the rationale for establishing the leak repair requirements. While EPA proposed a two-tier rate, the NPRM did not propose or imply that the leak rate for older appliances would not be tightened. To the contrary, the NPRM discussed the Agency's intent to lower leak rates for older appliances while establishing a two-tier system. Older appliances should be maintained to be as tight as possible. By mandating leak repair trigger rates, EPA ensures that older appliances will be maintained and emissions of refrigerants will be minimized to the lowest achievable level as appliances age.

EPA received mixed comments regarding the Agency's proposal to differentiate leak rates for appliances based upon date of manufacture. Some commenters expressed concern that this approach complicates the regulation because owners and operators would need to rely on a nameplate on the appliance for the date of manufacture or other data that might not be readily available. Other commenters requested that the date of manufacture for custom-built appliances be identified according to the date that the appliance leaves the factory, because the date of shipment and the date that the appliance was actually placed into service may be years apart. While others suggested that the date of manufacture be defined as the date of mechanical completion or start-up date of the system.

EPA also requested comment on whether it is possible to distinguish between slow leakage, servicing emissions, and catastrophic emissions in establishing and complying with leak rate limits. This question becomes important with a lower permissible leak rate because the percentage of charge lost through servicing and catastrophic emissions may be a significant fraction of the lower rate.

EPA received comment that amendments to the leak rate required practices may not be necessary because in many sectors, such as the commercial sector, leaks tend to be catastrophic in nature. One commenter stated that it would not be helpful to exclude catastrophic losses from leak rate calculations, since the immediate repair of such appliances is necessary in order to get the refrigeration system back on-line. The commenter suggested that such an exclusion may actually be detrimental if the Agency then requires some sort of recordkeeping requirement to keep track of which emissions were from ordinary leaks and which were from catastrophic events. In such instances repairs are not only required but a necessity in order to remain operable; thus, it is in the best interest of the owner to control and reduce leaks. Commenters stated that owners or operators should not be faulted for catastrophic leakage of refrigeration equipment; thus, it is appropriate to establish leak rates based on slow leaks alone.

The primary goal of the leak repair provisions has been to reduce emissions from leaking appliances. EPA recognizes that catastrophic emissions are often beyond the control of appliance owners or operators. EPA believes that catastrophic losses will come to the attention of appliance owners or operators very quickly after they occur and will be large compared to losses from slow emissions. In sectors such as the commercial refrigeration sector, immediate repair of catastrophic leaks is required in order to sustain business operations. EPA believes that a requirement to repair the appliance so that it does not continue to leak above the applicable annual leak rate would not be expected to compromise the need of the owner or operator to repair the catastrophic leak. Since the commercial sector would need to respond to catastrophic releases immediately, EPA believes that adherence to the leak repair requirements simply reinforces the need to repair leaks in a timely manner. The environmental benefit of the requirements is that they persuade owners or operators to take action to address the operation of appliances that have a history of catastrophic failures. Under the proposed and final leak repair regulations such appliances would eventually require retirement, replacement, or retrofit to substitutes that are less damaging to the ozone

layer. The intent of the requirements is not to mandate continuous repair attempts on leaking appliances, but to take efforts to maintain appliances such that they will not undergo repeated patterns of repair attempts followed by refrigerant recharge. EPA emphasizes that the aim of the leak repair regulations is to minimize emissions of ozone-depleting refrigerants to the lowest achievable level by requiring the repair, replacement, or retrofit of leaking appliances. Therefore, while catastrophic loses are not the intended focus of the leak repair requirements, such loses are not exempt from the leak repair requirements.

5. Extension of Leak Repair Requirements to HFC and PFC Appliances

In the NPRM, EPA explained that establishing consistent leak repair requirements for CFC, HCFC, HFC, and PFC appliances would minimize emissions of all four types of refrigerants and substitutes. EPA further explained that exempting HFC and PFC substitutes from conservation requirements could lead to confusion and skepticism regarding similar requirements for CFCs and HCFCs, which would undermine implementation of the statutory directives to reduce emissions of these substances to the lowest achievable level and to maximize their recapture and recycling. Hence in the NPRM, EPA requested comment on its proposal to extend the leak repair requirements to owners or operators of appliances using HFC and PFC substitutes.

EPA received comments opposing the extension of the leak rate regulations to HFC and PFC refrigerant substitutes. Commenters cited the price of HFCs and the need for efficient operation of refrigeration equipment as incentives for owners or operators to repair leaks as soon as possible, regardless of a maximum permissible leak rate. Comments also questioned the statutory authority of EPA to regulate substances that do not contribute to depletion of the stratospheric ozone layer (*i.e.*, class I and class II ODS). One commenter stated that the proposal was arbitrary, capricious, or otherwise not in accordance with law; therefore, it would be illegal for the Agency to impose leak repair requirements on those systems and refrigerants for which it lacks sufficient data. The commenter also stated that the requirements cannot apply to leaks that occur during normal use, since these leaks do not occur during the servicing, maintenance, or disposal of appliances.

In the NPRM (63 FR 32045; June 11, 1998) EPA explained that section 608(a) provides EPA with authority to promulgate the proposed requirements. Section 608(a) requires EPA to promulgate regulations regarding use and disposal of class I and II substances that ''reduce the use and emission of such substances to the lowest achievable level'' and ''maximize the recapture and recycling of such substances.'' Section 608(a) further provides that ''(s)uch regulations may include requirements to use alternative substances (including substances which are not class I or class II substances) * * * or to promote the use of safe alternatives pursuant to section 612 or any combination of the foregoing.'' In addition, section 608(a)(2) requires EPA to promulgate regulations establishing standards and requirements regarding use and disposal of class I and class II substances during service, repair, or disposal of appliances.

While market price may be an incentive against venting, it has not been found to be a sufficient deterrent against the continuous practice of repair attempts followed by refrigerant recharges. EPA inspections continue to find excessive leak rates from IPR appliances. EPA believes that the statutory authority to promulgate regulations regarding use of class I and II substances, including requirements to use alternatives, is sufficiently broad to include requirements on how to use alternatives, where regulation is needed to reduce emissions and maximize recycling of class I and II substances.

Therefore, in accordance with the requirements of section 608(c) of the Act, EPA is extending the leak repair required practices and the associated reporting and recordkeeping requirements to owners or operators of appliances using HFC blends that consist in part of an ODS. Therefore owners or operators of appliances using HFC refrigerant blends including but not limited to R–401A and B, R–402A and B, R–403B, R–406A, R–408A, R–409A, R–411A, and B, R–414A and B, R–416A, R–500, R–502, R–503, NARM–502, RB–276 (FreeZone), GHG–HP, GHG–X5, Freeze 12, ICOR, THR–04, and R–509 are covered under the leak repair required practices because the refrigerants consist in part of a class II ODS. This extension has been accomplished by amending the definition of refrigerant at § 82.152 in a previous rulemaking (March 12, 2004; 69 FR 11946). The change in the definition means that substitutes consisting in whole or in part of an ODS are covered under the required practices of 40 CFR part 82, subpart F (*i.e.*, section 608).

EPA has decided not to extend the leak repair requirements or the associated reporting and recordkeeping requirements to owners or operators of appliances using pure HFC or PFC substitutes. However, EPA emphasizes that HFC and PFC substitutes are not exempt from the statutory venting prohibition of section 608(c)(2) of the Act (69 FR 11946; March 12, 2004). Therefore, in the absence of any required leak repair requirements, it statutorily remains illegal to knowingly vent HFC and PFC substitutes during the maintenance, service, repair, and disposal of comfort cooling, commercial refrigeration, and industrial process refrigeration appliances.

6. Clarification of Leak Repair Requirements

In the May 14, 1993 final rule (58 FR 28660), EPA published final regulations requiring owners and operators to ''have all leaks repaired'' where an appliance subject to the leak repair requirements was leaking above the applicable allowable annual leak rate (58 FR 28716). In a subsequent rulemaking regarding leak repair requirements published on August 8, 1995 (60 FR 40420), EPA amended that language to state that ''repairs must bring the annual leak rate to below 35 percent of the total charge during a 12-month period'' (60 FR 40440), or where appropriate, to below 15 percent. This change in the rule recognized that appliances without hermetically sealed refrigerant circuits should not be expected to have a ''zero percent'' leak rate.

EPA believes that it is practical to require the owners or operators to maintain a leak rate that is at or below the applicable allowable annual rate, and where the leak rate has been exceeded to make the necessary repairs to return the appliance's leak rate to or below the applicable allowable leak rate or to retrofit/retire the appliance. EPA emphasizes that compliance with the required practices for leak repair is dependent upon the leak rate of the appliance not the repair of a specific leak or leaks.

In response to commenters' concerns regarding verification testing, EPA is clarifying that at this time verification testing is only required for: owners or operators of industrial process refrigeration appliances, in accordance with § 82.156(i)(3); owners or operators of federally-owned comfort cooling appliances who are granted additional time for repairs under § 82.156(i)(5)(iii); and owners or operators of federally-owned commercial refrigeration

appliances who are granted additional time for repairs under § 82.156(i)(1)(iii). While verification tests are not required for all sectors, such testing performed as a part of leak repair efforts has advantages for owners and operators. EPA believes that attempts to verify repairs at the point of repair and again after the appliance is operational will aid the owner or operator in demonstrating compliance with the leak repair regulations. In contrast, multiple repair attempts of the same leaks followed by refrigerant recharge demonstrate that the repair of the appliance did not bring the annual leak rate to below the applicable leak rate as required by § 82.156(i).

EPA requires owners and operators of industrial process refrigeration appliances and in some instances for federally-owned commercial refrigeration appliances and federally-owned comfort cooling appliances that are granted additional time to make repairs, to perform initial and followup verification tests to establish that repairs were successful. EPA recognizes that verification tests indicate the success or failure of the repair effort for a given leak or set of leaks, not the leak rate of an appliance. In the August 8, 1995 rulemaking, EPA stated that it was not the Agency's ''intention to imply that the verification tests show what the leak rate is. However, EPA believes that where the verification tests show that the repairs have been successful, in most cases this will mean that there has been a reduction in the leak rate'' (60 FR 40430).

Section 82.156(i) requires owners or operators to conduct repairs to lower an appliance's leak rate below the applicable allowable annual leak rate. EPA emphasizes that knowing a leak has been repaired does not necessarily mean that the owner or operator is aware of the current leak rate of the appliance or whether the owner or operator is in compliance with the required practices of § 82.156. Such is the case in instances where owners or operators make repair attempts but do not calculate the leak rate. Without calculating the leak rate the owner or operator would have no means of determining compliance with the leak repair required practices.

In the NPRM, EPA described four compliance scenarios to assist the owners or operators in determining what actions are appropriate when an appliance is leaking above the applicable allowable annual leak rate. Due to the volume of questions that those scenarios generated, EPA feels that further discussion of the leak repair compliance scenarios is warranted. The compliance scenarios described in the NPRM are consistent with the regulatory requirements, and the Agency did not propose any regulatory changes associated with these scenarios. EPA discussed the scenarios in the NPRM to provide compliance assistance. EPA solicited feedback on these scenarios and the outcomes described in each scenario in order to evaluate the need for further clarification and possible regulatory amendments. The following discussion of five scenarios (the previous four scenarios from the NPRM (63 FR 32070; June 11, 1998) and one more scenario added for further clarity) aims to provide further clarification to the regulated community on how the leak rate and verification tests relate to the repair and/or retrofit/retire provisions promulgated at § 82.156(i). EPA has edited the scenarios to remove any ambiguity as to their applicability to industrial process refrigeration, comfort cooling, or commercial refrigeration appliances.

a. Scenario 1

In Scenario 1, the owner or operator of industrial process refrigeration appliances or federally-owned comfort-cooling or commercial appliances discovers that the appliance is leaking above the applicable allowable annual leak rate. The owner or operator fixes all leaks, and verifies that the leaks have been repaired consistent with the verification testing requirements of § 82.156(i), meaning an initial verification test was conducted at the conclusion of the repair efforts and a follow-up verification test was conducted within 30 days after the initial verification test. If a leak rate above the applicable allowable annual leak rate for the appliance is suspected after the repairs are completed and leaks are discovered at new locations, these leaks will be considered as a new leak occurrence for the appliance.

Leaks in the appliance that occur after repair attempts (whether or not they occur at the same location), but in the absence of mandatory initial and follow-up verification tests are considered violations for several reasons. First, the verification tests were not conducted in accordance with § 82.156. It is more likely that failure to verify that repairs were successful will lead to future leaks within the appliance. EPA considers refrigeration additions that occur after repair attempts, but in the absence of successful mandatory verification tests, to be continuing violations. This is because without verification, there is no evidence that the owner or operator brought the leak rate of the appliance beneath the applicable leak rate, even though repair attempts might have been made.

However, if mandatory verification tests show that repairs were successful and the appliance is once again suspected of having a leak at a new location that results in the appliance leaking above the applicable allowable leak rate (even if the leak occurs a short time after the repairs were completed), EPA considers these leaks as a new leak occurrence for the appliance. The next leak occurrence requiring addition of refrigerant would constitute a new leak occurrence for the appliance, and the owner or operator would be required to comply with all applicable requirements promulgated at § 82.156(i).

Scenario 1 as described in the NPRM was not applicable to owners or operators of comfort cooling or commercial refrigeration appliances that are not federally-owned or operated. These appliance owners or operators are encouraged but not currently mandated to perform initial and follow-up verification tests in order to ensure that the leak rate has been brought below the applicable leak rate. Owners or operators of comfort cooling or commercial refrigeration appliances that are not federally-owned or operated are required to repair leaks such that the leak rate of the appliance will not exceed the applicable leak rate within 30 days of discovery. Owners or operators are relieved of this obligation if they choose to develop, within 30 days of discovery of a leak, a one-year retrofit or retirement plan in accordance with §§ 82.156(i)(1) and (i)(5), for commercial and comfort cooling appliances, respectively.

b. Scenario 2

Scenario 2 as described in the NPRM was not applicable to owners or operators of comfort cooling or commercial refrigeration appliances that are not federally-owned or operated, because such owners or operators are not required to perform initial and follow-up verification tests. In response to public comments requesting clarity on the scenario, EPA has clarified Scenario 2 such that it is specific to repeated leaks at the same location (same location meaning an identical point within the same appliance).

Under Scenario 2, the owner or operator of the industrial process refrigeration or under certain circumstances the owner or operator of federally owned comfort cooling or commercial appliance with a refrigerant charge greater than 50 pounds discovers that the appliance is leaking above the applicable allowable annual leak rate. The owner or operator fixes the leaks

and verifies that they have been repaired consistent with § 82.156(i). The next time leaks are suspected within a consecutive 12-month period, the owner or operator finds leaks have occurred at the same location (meaning the identical point within the same appliance). This ongoing problem is an indication that appropriate repairs have not been conducted. Where leaks at the same location continue to occur, the owner or operator has not performed repair efforts necessary to reduce the leak rate below the applicable allowable annual leak rate. Thus, the owner or operator has violated the required practices established in § 82.156(i).

c. Scenario 3

In the third scenario, the owner or operator discovers that the appliance is leaking above the applicable allowable annual rate and identifies ten different leak sources that are contributing to the high leak rate. The owner or operator determines that repairing six leaks will bring the appliance into compliance by lowering the leak rate to below the applicable allowable annual rate. The owner or operator believes that leaving four leaks unrepaired still will result in a leak rate below the applicable allowable annual rate. The owner or operator fixes and as required for industrial process refrigeration and federally-owned comfort cooling and commercial appliances verifies that these six leaks have been repaired consistent with the requirements promulgated at § 82.156(i). The appliance continues to leak, but below the applicable allowable annual rate.

In the NPRM, EPA stated that in this scenario the owner or operator of the appliance complied with the requirements by actually reducing and maintaining a leak rate that is below the applicable allowable annual rate. Such is the case for instances where owners or operators are mandated to perform initial and follow-up verification tests, in accordance with § 82.156(i). EPA is concerned that this scenario as proposed may not provide compliance for owners or operators who are not currently mandated to perform initial and followup verification tests, namely owners or operators of commercial and comfort cooling appliances.

In order to remain consistent with the regulatory language requiring owners or operators to make repairs that bring the annual leak rate to below the applicable leak rate, EPA is clarifying that it cannot condone actions by owners or operators to knowingly allow appliances to leak. EPA believes that failure to repair all known leaks, and successfully verify repairs when required, leaves the owner or operator with a great deal of uncertainty concerning their compliance with the leak repair required practices. In the absence of verification, the owner or operator of comfort cooling and commercial appliances would have no way of knowing if their appliance is not in compliance until a future need to add refrigerant. If the owner or operator decided to leave known leaks unchecked, a future addition of refrigerant could lead to a continuing violation for failure to sufficiently repair the appliance such that it does not leak above the applicable leak rate within 30 days of discovery.

d. Scenario 4

In the fourth scenario, the owner or operator discovers that the appliance is leaking above the applicable allowable annual rate. The owner or operator identifies ten different leak sources that are contributing to the leak rate. The owner or operator decides that repairing six leaks will bring the appliance into compliance by lowering the leak rate to below the applicable allowable annual rate. The owner or operator fixes and verifies that these leaks have been repaired consistent with the requirements promulgated at § 82.156(i).

Upon later inspection, or by the future need to add refrigerant, it is discovered that the appliance continued leaking above the applicable allowable annual rate and there are no newly identified leak sources. In this scenario, the owner or operator of comfort cooling or commercial refrigeration appliances did not lower the leak rate in accordance with § 82.156(i).

As previously stated in the discussion of Scenario 3, EPA cannot condone actions by owners or operators to knowingly allow appliances to leak, and believes that such actions result in uncertainty concerning compliance with the leak repair required practices. EPA considers this failed repair attempt a violation of the leak repair required practices because the owner or operator did not sufficiently repair the appliance. Meaning that even after repair attempts, the appliance continued to leak above the applicable annual leak rate. In the absence of verification and the subsequent addition of refrigerant without the identification of new leaks, the owner or operator of the comfort cooling or commercial appliance is not considered to have used ''sound professional judgement'' in determining which leaks to repair. Owners or operators of appliances that pass mandatory initial and followup verification tests under § 82.156(i) (*i.e.*, industrial process refrigeration and federally-owned comfort and commercial refrigeration appliances) are not considered to be in violation of the leak repair required practices, as they have successfully passed initial and followup verification tests.

e. Scenario 5

EPA received comments questioning the applicability of the compliance scenarios to comfort cooling and commercial refrigerant appliances. Several commenters expressed concern that current EPA interpretation of the leak repair requirements could result in enforcement actions when the owner has made good faith attempts to repair all known leaks.

The commenters described a scenario in which repairs were made on all known leaks in a commercial or comfort cooling appliance. After this initial repair, the owner or operator discovers a new leak(s), in a different location(s) that bring the leak rate of the appliance above the applicable leak rate, as shown by the addition of refrigerant and calculation of the leak rate. This second round of leaks is once again repaired and the appliance is once again recharged with refrigerant. The commenters questioned why the second repair and second addition of refrigerant were viewed by EPA as continuing violations of the leak repair provisions. Or more simply stated, commenters questioned why the second addition of refrigerant that results in an annual leak rate above the applicable leak rate is viewed by EPA as a continuing violation from the first addition of refrigerant and subsequent repair. The commenters also noted that using this interpretation of the regulations would make it impossible for the owner or operator to know that their appliances were in compliance until the next leak occurrence or need for additional refrigerant. This assumes that the appliance would have a new leak or require the addition of refrigerant. If it did not after the initial repair, it may not be possible to know if the appliance was brought beneath the applicable trigger rate at all.

In response to public comments, EPA is emphasizing that the appliance owner or operator must demonstrate that the repair(s) brought the leak rate of the appliance below the applicable annual leak rate, in accordance with § 82.156. Consecutive or continued cycles of repair and subsequent refrigerant charges are not viewed by EPA as compliance with the required practices. However, in the absence of mandatory initial and followup verification, the owner or operator of comfort cooling and commercial refrigeration appliances

may not realize that a repaired appliance has remained out of compliance until the future need to add refrigerant. Therefore, until verification tests are mandated, EPA considers leak occurrences in commercial and comfort cooling appliances that have occurred after the appliance was repaired in compliance with § 82.156(i)(1) and (i)(5) as ''new'' if they involve different leak(s) than the previously repaired leak event.

Conversely, in instances where leaks continue to occur at the same location in a commercial refrigeration or comfort cooling appliance (meaning that the owner or operator continues to recharge after continued repair attempts on the same leak(s)), are viewed as violations of the leak repair provisions. EPA views patterns of futile repair attempts to repair leaks that continue to occur at the sale location followed by refrigerant recharge as violations of the leak repair requirement to bring the leak rate of the appliance beneath the applicable leak rate within 30 days of discovery. Such actions are not viewed as attempts to comply with the leak repair requirements since they result in an increase in refrigerant release to the atmosphere.

D. Recordkeeping for Leak Repair

Prior to the NPRM (June 11, 1998; 63 FR 32043), EPA received comments indicating that the recordkeeping and reporting requirements promulgated at § 82.166(n) may be confusing for those subject to the requirements. The structure of these provisions changed between the proposed and final rules (60 FR 3992; January 19, 1995 and 60 FR 40420; August 8, 1995). The August 8, 1995 final rule required the same reporting and recordkeeping requirement that EPA proposed in the January 19, 1995 NPRM, except for the changes discussed in the preamble to the August 8, 1995 final rule.

In the 1998 NPRM, EPA proposed to modify the structure and presentation of the requirements to provide clarity by indicating which records must be maintained and reported. EPA also proposed to extend the leak repair reporting and recordkeeping provisions to HFC and PFC appliances by incorporating them into the definition of ''refrigerant'' (63 FR 32058).

1. Applicability to Substitutes

In the NPRM, EPA proposed to extend the leak repair recordkeeping and reporting requirements for CFC and HCFC appliance owners or operators to owners or operators of HFC and PFC appliances. The NPRM proposed to extend these requirements by amending the definition of ''refrigerant'' to include HFC and PFC substitutes. The NPRM proposed that owners or operators of appliances that contain 50 or more pounds of refrigerant and leak above the applicable leak rate must adhere to the reporting and recordkeeping records in accordance with § 82.166(k), (n), (o), (p) and (q).

At this time, EPA is not finalizing the proposal to subject owners or operators of all HFC and PFC appliances to the recordkeeping and reporting requirements of § 82.166. However, today's action extends the recordkeeping and reporting requirements to owners or operators of appliances that use substitutes consisting of an ODS. EPA has not otherwise amended the recordkeeping and reporting requirements. These requirements are summarized below:

a. General Service and Repair Recordkeeping and Reporting

In accordance with § 82.166(k), owners or operators of appliances normally containing 50 or more pounds of a refrigerant containing a class I or class II ODS and leak above the applicable leak rate are subject to the following recordkeeping and reporting requirements.

(1) Keep service records documenting the date and type of service, as well as the quantity of refrigerant added.

(2) Keep records of refrigerant purchased and dates of refrigerant addition in instances where owners or operators service or repair their own appliances added to such appliances in cases where owners or operators add their own refrigerant.

b. Extension of 30-day Repair Requirement

In accordance with § 82.156(i)(1)(i), if owners or operators of the federally-owned commercial refrigeration appliances determine that leaks cannot be repaired within 30 days and therefore seek an extension, they must document all repair efforts and notify EPA of their inability to comply within the 30-day repair requirement. The notification must state the reason for the inability to comply within the 30-day repair requirement. If EPA determines that the extension is not justified, EPA will notify the owner or operator within 30 days of receipt of the notification.

In accordance with § 82.156(i)(2) and § 82.156(i)(5)(i), owners or operators of industrial process refrigeration appliances and federally-owned comfort cooling and commercial refrigeration appliances who determine that the leak rate of the appliance cannot be brought to below 35 percent during a 12-month period within 30 days (or 120 days, where an industrial process shutdown is required) of discovering the leak and are granted an extension, must document all repair efforts. They must also notify EPA of the reason for the inability to repair within 30 days of making such a determination.

c. Notification Due to Failed Verification Test

In accordance with § 82.156(i)(3)(iii), the owner or operator of an industrial process refrigeration appliance that fails a follow-up verification test must notify EPA within 30 days of the failed follow-up verification test. The notification must include the dates and types of all initial and follow-up verification tests performed and the test results for all initial and follow-up verification tests within 30 days after conducting each test.

d. Relief From the Obligation To Retrofit or Replace an Appliance

In accordance with § 82.156(i)(3)(iv), the owner or operator of industrial process refrigeration appliances and federally owned comfort cooling and commercial appliances who are granted additional time to repair are relieved of the obligation to retrofit or replace the industrial process refrigeration appliance if second repair efforts to fix the same leaks that were the subject of the first repair efforts are successfully completed within 30 days (or 120 days where an industrial process shutdown is required) after the initial failed follow-up verification test. The owner or operator is required to notify EPA within 30 days of the successful follow-up verification test and is no longer subject to the obligation to retrofit or replace the appliance.

In accordance with § 82.156(i)(3)(v), the owner or operator of industrial process refrigeration appliances must notify EPA within 30 days if the owner or operator determines that they are relieved of the obligation to retrofit or replace appliances because within 180 days of the initial failed follow-up verification test they established that the appliance's annual leak rate did not exceed the applicable leak rate (in accordance with § 82.156(i)(4)). The notification must include a plan to fix other outstanding leaks for which repairs are planned but not yet completed to achieve a rate below the applicable allowable leak rate. The notification must also include the identification of the facility and date the original information regarding additional time beyond the initial 30 days was filed. The owner or operator would no longer be subject to the

obligation to retrofit or replace the appliances that arose as a consequence of the initial failure to verify that the leak repair efforts were successful.

The notification must be relevant to the affected appliance and must include: Identification of the facility; the leak rate; the method used to determine the leak rate and full charge; the date a leak rate of greater than the allowable annual leak rate was discovered; the location of leaks(s) to the extent determined to date; and any repair work that has been completed thus far including the date that work was completed. The information must also include written reasons why more than 30 days are needed to complete the work and an estimate of when repair work will be completed. If changes from the original estimate of when work will be completed result in moving the completion date forward from the date submitted to EPA, the reasons for these changes must be documented and submitted to EPA within 30 days of discovering the need for such a change.

e. Relief From 30-Day Repair Requirement Due to Adoption of Retrofit/Retirement Plan

In accordance with § 82.156(i)(6), owners or operators of industrial process refrigeration and federally owned comfort cooling and commercial appliances are not required to repair, if within 30 days of discovering the exceedance of the applicable leak rate or within 30 days of a failed follow-up verification test in accordance with § 82.156(i)(3)(ii), they develop a one-year retrofit or retirement plan for the leaking appliance. The retirement or retrofit plan must be kept at the site of the appliance and made available for EPA inspection upon request. The plan must be dated and all work under the plan must be completed within one year of the plan's date.

Similarly, in accordance with § 82.156(i)(6)(i), if the owner or operator of industrial process refrigeration and federally owned comfort cooling and commercial appliances has attempted repair but later decides to proceed with a plan to retrofit or retire the appliance, they must develop a retrofit or retirement plan within 30 days of the determination to retrofit or retire the appliance and complete the plan within one year from discovery that the leak rate exceeded the applicable allowable leak rate.

In all cases, the written plan shall be prepared no later than 30 days after the owner or operator has determined to proceed with retrofitting or retiring the appliance. In addition, the following information must be maintained and is due to EPA Headquarters at the time specified in the paragraph imposing the specific reporting requirement, or no later than 30 days after the decision to retrofit or retire the appliance, whichever is later:

(1) The identification of the industrial process facility;

(2) The leak rate;

(3) The method used to determine the leak rate and full charge;

(4) The date a leak rate of 35 percent or greater was discovered;

(5) The location of leaks(s) to the extent determined to date;

(6) Any repair work that has been completed thus far and the date that the work was completed;

(7) A plan to complete the retrofit or replacement of the appliance;

(8) The reasons why more than one year is necessary to retrofit to replace the appliance;

(9) The date of notification to EPA; and

(10) An estimate of when retrofit or replacement work will be completed.

If the estimated date of completion changes from the original estimate and results in moving the date of completion forward, documentation of the reason for these changes must be submitted within 30 days of making the determination that an extension is required along with the date of notification to EPA regarding this change and the estimate of when the work will be completed.

f. Additional Time for Retirement or Retrofit

In accordance with § 82.156(i)(7), the owners or operators of industrial process refrigeration appliances will be allowed additional time to complete the retrofit or retirement of industrial process refrigeration appliances if due to delays occasioned by the requirements of other applicable Federal, State, or local laws or regulations, or due to the unavailability of a suitable replacement refrigerant with a lower ozone depletion potential. Under these circumstances, the owner or operator of the appliance must notify EPA within six months after the 30-day period following the discovery of an exceedance of the 35 percent leak rate. Records necessary to allow EPA to determine that these provisions apply and the length of time necessary to complete the work must be submitted to EPA in accordance with § 82.166(o), as well as maintained on-site. EPA will notify the owner or operator of its determination within 60 days of receipt the submittal.

An additional one-year period beyond the initial one-year retrofit period is allowed for industrial process refrigeration appliances where the following criteria are met:

(A) The new or the retrofitted industrial process refrigerant appliance is custom-built;

(B) The supplier of the appliance or one or more of its critical components has quoted a delivery time of more than 30 weeks from when the order is placed;

(C) The owner or operator notifies EPA within six months of the expiration of the 30-day period following the discovery of an exceedance of the 35 percent leak rate to identify the owner or operator, describe the appliance involved, explain why more than one year is needed, and demonstrate that the first two criteria are met in accordance with § 82.166(o); and

(D) The owner or operator maintains records that are adequate to allow a determination that the criteria are met.

The owners or operators of industrial process refrigeration appliances may request additional time to complete retrofitting or retiring the appliance beyond the additional one-year period if needed and where the initial additional one year was granted. The request shall be submitted to EPA before the end of the ninth month of the first additional year and shall include revisions of information required under § 82.166(o). Unless EPA objects to this request submitted in accordance with § 82.166(o) within 30 days of receipt, it shall be deemed approved.

In accordance with § 82.156(i)(8), owners or operators of federally-owned commercial or comfort-cooling appliances will be allowed an additional year to complete the retrofit or retirement of the appliances if the conditions described in paragraph § 82.156(i)(8)(i) of this section are met, and will be allowed one year beyond the additional year if the conditions in paragraph § 82.156(i)(8)(ii) are met.

In accordance with § 82.156(i)(8)(i), up to one additional one-year period beyond the initial one-year retrofit period is allowed for such appliances where the following criteria are met:

(A) Due to complications presented by the Federal agency appropriations and/or procurement process, a delivery time of more than 30 weeks from the beginning of the official procurement process is quoted, or where the appliance is located in an area subject to radiological contamination and creating a safe working environment will require more than 30 weeks;

(B) The operator notifies EPA within six months of the expiration of the 30-day period following the discovery of an exceedance of the applicable allowable annual leak rate to identify the operator,

describe the appliance involved, explain why more than one year is needed, and demonstrate that the first criterion is met in accordance with § 82.166(o); and

(C) The operator maintains records adequate to allow a determination that the criteria are met.

In accordance with § 82.156(i)(8)(ii), the owners or operators of federally-owned commercial or comfort-cooling appliances may request additional time to complete retrofitting, replacement or retiring such appliances beyond the additional one-year period if needed and where the initial additional one year was granted in accordance with paragraph § 82.156(i)(8)(i). The request shall be submitted to EPA before the end of the ninth month of the first additional year and shall include revisions of information earlier submitted as required under § 82.166(o). Unless EPA objects to this request submitted in accordance with § 82.166(o) within 30 days of receipt, it shall be deemed approved.

g. Omission of Purged Refrigerant From Leak Rate Calculations

In calculating annual leak rates, purged refrigerant that is destroyed at a verifiable destruction efficiency of 98 percent or greater will not be counted toward the leak rate. Owners or operators who wish to exclude purged refrigerants that are destroyed from annual leak rate calculations must maintain records on-site to support the amount of refrigerant claimed as sent for destruction. Records shall be based on a monitoring strategy that provides reliable data to demonstrate that the amount of refrigerant claimed to have been destroyed is not greater than the amount of refrigerant actually purged and destroyed and that the 98 percent or greater destruction efficiency is met. Records shall include flow rate, quantity or concentration of the refrigerant in the vent stream, and periods of purge flow.

In addition, the owners or operators who wish to exclude purged refrigerants that are destroyed from annual leak rate calculations must maintain on-site and submit to EPA, within 60 days after the first time such exclusion is used by that facility, the following information:

(i) The identification of the facility and a contact person, including the address and telephone number;

(ii) A general description of the refrigerant appliance, focusing on aspects of the appliance relevant to the purging of refrigerant and its subsequent destruction;

(iii) A description of the methods used to determine the quantity of refrigerant sent for destruction and type of records that are being kept by the owners or operators where the appliance is located;

(iv) The frequency of monitoring and data-recording; and

(v) A description of the control device, and its destruction efficiency.

h. Determination of Full Charge

EPA has previously defined full charge as the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one of the following four methods or a combination of one of the following four methods: (1) The appliance manufacturers' determination of the correct full charge for the appliance; (2) Determining the full charge by appropriate calculations based on component sizes, density of refrigerant, volume of piping, and other relevant considerations; (3) The use of actual measurements of the amount of refrigerant added or evacuated from the appliance; and/or (4) The use of an established range based on the best available data, regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge, and where records are maintained in accordance with § 82.166(q).

Owners or operators choosing to determine the full charge as defined in § 82.152 of an affected appliance by using an established range or using that methodology in combination with other methods for determining the full charge defined in the following information: (1) The identification of the owner or operator of the appliance; (2) The location of the appliance; (3) The original range for the full charge of the appliance, its midpoint, and how the range was determined; (4) Any and all revisions of the full charge range and how they were determined; and (5) The dates such revisions occurred. These records are required to be maintained on-site at the facility in which the appliance is located for a minimum of three years.

2. Retrofit/Retire Using Lower Ozone-Depleting Potential (ODP) Refrigerants

In the NPRM, EPA proposed to amend § 82.156(i)(6) to incorporate a requirement that was discussed in the preamble to the May 14, 1993 final rule but that was inadvertently excluded from the regulatory text. In the preamble to the final rule, EPA indicated that if the owners or operators elect to retrofit or retire an appliance rather than repair leaks that are above the applicable allowable leak rate, the owners or operators must use a substitute with a lower ODP than the original refrigerant (58 FR 28680; May 14, 1993).

EPA received comments stating that the replacement of leaking appliances with more efficient appliances should yield significant environmental benefits, and the Agency should not require further environmental benefits by limiting the types of refrigerant that may be used (*i.e.,* requiring retrofit or replacement with a lower ODP refrigerant). Commenters also requested that the Agency address what the owner or operator should do when the only available substitute does not have a lower ODP and consider exempting systems using refrigerants with an ODP of zero.

EPA supports the use of higher efficiency appliances whenever possible. The Agency also believes that a requirement for owners or operators to retrofit or replace leaking appliances with a refrigerant with a lower ODP is important to minimize the use of refrigerants that are potentially more harmful to the stratospheric ozone layer. It would be environmentally unsound to exempt owners or operators from repairing leaks on the grounds that they will retrofit or replace the leaky appliance if the replacement refrigerant would pose an equivalent or even a greater threat to the stratospheric ozone layer. EPA also believes that in many instances older appliances that were designed to use ozone-depleting refrigerants (especially CFCs) are less efficient than newer HCFC and HFC appliances that are currently available. Therefore, EPA has modified the regulatory text to ensure that only a substitute with a lower or equivalent ODP is used.

EPA has amended § 82.156(i)(6) to incorporate the requirement to retrofit with a lower ODP refrigerant, as originally discussed in the preamble to the May 14, 1993 final rule (58 FR 28680). In accordance with the amended § 82.156(i)(6), owners or operators who elect to retire or retrofit an appliance rather than repair leaks that are above the applicable allowable leak rate, must use a refrigerant or substitute with a lower ODP than the original refrigerant. Owners and operators still retain the option to either retrofit/retire the appliance or repair the existing leaks in accordance with the existing requirements at § 82.156(i)(6) for industrial process refrigeration and §§ 82.156(i)(1)(i), (i)(5)(i), (i)(6), and (i)(9) for commercial refrigeration and comfort cooling appliances.

3. Minor Clarifications

EPA proposed to modify the text throughout § 82.156(i) and § 82.166(n)

and (o) to substitute the word ''retire'' for the word ''replace'' and to add ''operators'' where the regulation inadvertently refers solely to owners in order to better describe the activities that are discussed and to clarify that the requirements are applicable to both owners and operators (63 FR 32071; June 11, 1998). EPA also proposed to modify § 82.156(i)(3) which requires owners and operators to exercise sound professional judgement and to perform verification tests, to clarify that it applies to all owners and operators of industrial process refrigeration appliances and not just to those who are granted additional time to complete repairs. At the same time, EPA proposed to clarify that the paragraph applies to owners and operators of federally-owned commercial refrigeration appliances and of federally-owned comfort cooling appliances who are granted additional time to repair under paragraphs (i)(1) and (i)(5). EPA requested comment on these proposed changes regarding whether the changes would improve the clarity and readability of the regulatory text. EPA received general comments stating uncertainly with interpretation of the leak repair required practices at § 82.156 for leak repair; however, the Agency did not receive any negative or controversial comments specific to the request for comments concerning the proposed minor clarifications.

As proposed, EPA has modified the text throughout § 82.156(i) and § 82.166(n) and (o)(4) to substitute the word ''retire'' for the word ''replace'' and to add ''operators'' where the regulation inadvertently refers solely to owners. EPA deems these changes as necessary, because as explained in the NPRM the term ''retire'' better describes the activities that are discussed and the requirements are applicable to both appliance owners and operators.

As proposed, EPA has modified paragraph § 82.156(i)(3) which requires owners and operators to exercise sound professional judgement, to clarify that ''sound professional judgment'' applies to all owners and operators of industrial process refrigeration appliances, federally-owned commercial refrigeration appliances, and federally-owned comfort cooling appliances and not just to those who are granted additional time under paragraphs (i)(1)(i), (i)(2)(i), and (i)(5).

EPA has made minor clarifying changes to the regulatory text at § 82.156(i)(3)(i) and (ii) by specifically stating that the requirements apply to owners and or operators of federally-owned comfort cooling and commercial appliances. EPA has also specifically stated, in § 82.156(i)(3)(i), that the exemption from the verification requirement is applicable in instances when the owners or operators will retrofit or retire the industrial process refrigeration equipment, federally-owned commercial refrigeration appliance, or federally-owned comfort cooling appliance (formerly included only by reference to paragraph (i)(6)).

In addition, EPA has amended § 82.156(i)(3)(ii) and (i)(6)(i) to provide owners and operators of industrial process refrigeration appliances, federally-owned commercial refrigeration appliances, or federally-owned comfort cooling appliances who have been unsuccessful in their repair attempts, and therefore are switching to a retrofit/retirement mode, 30 days from leak discovery to prepare and one year to execute a retrofit/retirement plan. EPA recognizes the need to provide the owners or operators with sufficient time to develop and implement retrofit or retirement plans; therefore, the reference to the date of the failure to verify that repairs have been successfully completed has been eliminated. By deleting this reference, owners or operators have 30 days from the verification test failure to develop a retrofit/retirement plan, and one year from the plan's date to complete the retrofit or retirement (or such longer time periods as may apply under § 82.156(i)(7) and (i)(8)). In addition, EPA has added the term ''comfort cooling'' to § 82.156(i)(5) to remove any ambiguity as to the type of appliance that is applicable to this subparagraph.

EPA has also made minor changes to the reporting and recordkeeping requirements throughout § 82.166(n) and (q). EPA has clarified that the reporting requirements of paragraphs (n), (n)(1), (n)(2), and (n)(3) are only required when specified under § 82.156. EPA has restated the required contents of retrofit or retirement plans throughout § 82.166(n). EPA has also clarified § 82.166(q) by stating that owners or operators who choose to determine the ''full charge,'' as defined at § 82.152, of an appliance by using an established range or using that methodology in combination with other methods for determining the full charge must maintain the specified information identifying the appliance and the methodology used to determine the ''full charge.''

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to Executive Order 12866 review.

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 82, subpart F under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB Control Number 2060–0256, EPA ICR number 1626.07. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672. This action does not impose any new information collection burden beyond the already-approved ICR. This final rule amends the leak repair reporting and recordkeeping requirements of § 82.166, without imposing additional requirements.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop,

acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

EPA is finalizing this rule to clarify how the leak repair requirements that implement the venting prohibition of Clean Air Act, section 608(c)(2) apply to substitutes for class I and class II ODS used in the refrigerant and air-conditioning appliances. The need for and the goal of this action is to reduce emissions of class I and class II ODS and their substitutes to the lowest achievable level consistent with section 608 of the Clean Air Act. Public comments submitted in response to the June 11, 1998 NPRM (63 FR 32043) raised concerns over the regulation of substitutes that do not contribute to the depletion of stratospheric ozone, and the extension of the leak repair requirements to appliances using such substitutes. Commenters also requested clarification of compliance scenarios that were presented in the NPRM.

As discussed in detail above, EPA is not finalizing the proposed changes to lower the leak rate and extend the requirements to appliances using substitutes that do not contain an ODS. EPA has also made editorial changes to clarify the compliance scenarios without changing their applicability, in order to remain consistent with the leak repair required practices. Therefore, the remainder of this rule results in a clarification of the existing leak repair requirements as they apply to substitutes that consist of an ODS.

EPA performed a detailed screening analysis in 1992 of the impact of the recycling regulation for ozone-depleting refrigerants on small entities that may be impacted by this rulemaking such as owners or operators of commercial refrigeration appliances (such as, small independent grocers and warehouses), comfort cooling appliances (such as small residential and office buildings), and industrial process refrigeration appliances. The methodology of this analysis is discussed at length in the May 14, 1993 regulation (58 FR 28710). That analysis showed that recovery of refrigerants during repair is cost-effective due in part to the increased cost of ozone-depleting refrigerants.

EPA has updated that analysis to examine the impact of the recycling regulation for substitutes for all aspects of the June 11, 1998 NPRM (63 FR 32044). EPA is finalizing the NPRM in three separate actions (*i.e.,* venting prohibition and substitutes sales restriction (69 FR 11946; March 12, 2004), certification of refrigerant recovery and recycling equipment, and leak repair requirements). The methodology for the updated analysis is the same as for the initial 1992 analysis, except EPA has also considered the changing market share of HFC equipment and compliance with the venting prohibition that would occur in the absence of the rule. This approach makes the screening analysis more consistent with the cost-benefit analysis discussed above. In the updated screening analysis, EPA estimates that 118 small businesses may incur compliance costs in excess of 1% of their sales, while 39 small businesses may incur compliance costs in excess of 3% of their sales for all aspects of the refrigerant recovery and recycling rule when taking all aspects of the rule under consideration (*i.e.,* venting prohibition and sales restriction, refrigerant recycling and recovery equipment, and leak repair requirements). These numbers respectively represent 0.1% and 0.03% of the 122,416 small businesses that EPA estimates are affected by finalization of all three components of the NPRM.

EPA has concluded that when isolating portions of the analysis dealing with the clarification of the leak repair requirements for appliances using substitutes consisting of an ODS, that today's rulemaking will not have a significant economic impact on a substantial number of small entities. Since this rule does not finalize the proposal to extend the leak repair reporting and recordkeeping requirements, as summarized above in Section D. ''Recordkeeping for Leak Repair,'' to appliances containing 50 pounds or more of a non-ODS substitutes, the remainder of this rule is viewed as a clarification of how the leak repair requirements for ODS refrigerants apply to appliances using ODS substitutes. With this rulemaking EPA is stating that regulations affecting appliances using ODSs apply to refrigerants and substitutes alike, if they consist whole or in part of an ODS. In addition, it is assumed that ODS substitutes are replacing refrigerants whose manufacture and import is banned, restricted, or currently undergoing phaseout under the EPA phaseout regulations (40 CFR 82, part 82 subpart A). Therefore EPA assumes an impact of less than 1% upon owners or operators of appliances with refrigerant charges of 50 pounds or more, including the 0.1% and 0.03% of the 122,416 small businesses that EPA estimates would have been affected by finalizing all three components of the NPRM.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. EPA has made numerous efforts to involve small entities in the rulemaking process and to incorporate flexibility into the proposed rule for small entities, where appropriate. Efforts to involve small entities include formal and informal stakeholder meetings, which included several trade groups representing small businesses, and a number of individual meetings with both small businesses and associations representing small businesses. EPA has also met with industry groups representing the commercial grocery and supermarket sectors. EPA has accepted and considered all comments and suggestions from trade organizations in finalizing this rule, regardless if the comments were received outside of the comment period. EPA has also developed outreach materials, including fact sheets which are available online and via the Ozone Hotline, to help small businesses to comply with the existing refrigerant recycling regulations and the prohibition on venting of both ozone-depleting refrigerants and their substitutes. Moreover, the proposed rule grants to small businesses working with

substitutes the same flexibility that was granted to small businesses working with CFC and HCFC refrigerants (58 FR 28667–28669, 28712).

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government Agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule is not expected to have a high cost because it supplements the statutory self-effectuating prohibition against venting refrigerants by ensuring that certain service practices are conducted that reduce emissions of ozone-depleting refrigerants and their substitutes. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This rule amends the leak repair requires for appliances using substitutes consisting of an ozone-depleting substance, which in turn protects human health and the environment from increased amounts of UV radiation and increased incidence of skin cancer.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355; May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards; therefore, EPA did not consider the use of any voluntary consensus standards in this rulemaking.

J. The Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the

Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). It will become effective March 14, 2005.

List of Subjects in 40 CFR Part 82

Environmental protection, Air pollution control, Reporting and recordkeeping requirements.

Dated: December 29, 2004.

Michael O. Leavitt,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 82, of the Code of Federal Regulations is amended as follows:

PART 82—[AMENDED]

■ 1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

■ 2. Section 82.152 is amended by revising the definition of ''Full charge'' and by adding a definition for ''Leak rate'' in alphabetical order to read as follows:

§ 82.152 Definitions.

* * * * *

Full charge means the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one or a combination of the following four methods:

(1) Use the equipment manufacturer's determination of the correct full charge for the equipment;

(2) Determine the full charge by making appropriate calculations based on component sizes, density of refrigerant, volume of piping, and other relevant considerations;

(3) Use actual measurements of the amount of refrigerant added or evacuated from the appliance; and/or

(4) Use an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge, and where records are maintained in accordance with § 82.166(q).

* * * * *

Leak rate means the rate at which an appliance is losing refrigerant, measured between refrigerant charges. The leak rate is expressed in terms of the percentage of the appliance's full charge that would be lost over a 12-month period if the current rate of loss were to continue over that period. The rate is calculated using only one of the following methods for all appliances located at an operating facility.

(1) Method 1. (i) Step 1. Take the number of pounds of refrigerant added to the appliance to return it to a full charge and divide it by the number of pounds of refrigerant the appliance normally contains at full charge;

(ii) Step 2. Take the shorter of the number of days that have passed since the last day refrigerant was added or 365 days and divide that number by 365 days;

(iii) Step 3. Take the number calculated in Step 1. and divide it by the number calculated in Step 2.; and

(iv) Step 4. Multiply the number calculated in Step 3. by 100 to calculate a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added}}{\text{pounds of refrigerant in full charge}} \times \frac{\text{365 days/year}}{\text{shorter of: \# days since refrigerant last added or 365 days}} \times 100\%$$

(2) Method 2. (i) Step 1. Take the sum of the quantity of refrigerant added to the appliance over the previous 365-day period (or over the period that has passed since leaks in the appliance were last repaired, if that period is less than one year),

(ii) Step 2. Divide the result of Step 1. by the quantity (*e.g.,* pounds) of refrigerant the appliance normally contains at full charge, and

(iii) Step 3. Multiply the result of Step 2. by 100 to obtain a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added over past 365 days (or since leaks were last repaired, if that period is less than one year)}}{\text{pounds of refrigerant in full charge}} \times 100\%$$

* * * * *

■ 3. Section 82.156 is amended by revising paragraphs (i)(3) introductory text, (i)(3)(i), (i)(3)(ii), (i)(5) introductory text, (i)(6) introductory text, and (i)(6)(i), to read as follows:

§ 82.156 Required practices.

* * * * *

(i) * * *

(3) Owners or operators of industrial process refrigeration equipment and owners or operators of federally-owned commercial refrigeration equipment or of federally-owned comfort cooling appliances who are granted additional time under paragraphs (i)(1) or (i)(5) of this section, must have repairs performed in a manner that sound professional judgment indicates will bring the leak rate below the applicable allowable leak rate. When an industrial process shutdown has occurred or when repairs have been made while an appliance is mothballed, the owners or operators shall conduct an initial verification test at the conclusion of the repairs and a follow-up verification test. The follow-up verification test shall be conducted within 30 days of completing the repairs or within 30 days of bringing the appliance back on-line, if taken off-line, but no sooner than when the appliance has achieved normal operating characteristics and conditions. When repairs have been conducted without an industrial process shutdown or system mothballing, an initial verification test shall be conducted at the conclusion of the repairs, and a follow-up verification test shall be conducted within 30 days of the initial

verification test. In all cases, the follow-up verification test shall be conducted at normal operating characteristics and conditions, unless sound professional judgment indicates that tests performed at normal operating characteristics and conditions will produce less reliable results, in which case the follow-up verification test shall be conducted at or near the normal operating pressure where practicable, and at or near the normal operating temperature where practicable.

(i) If the owners or operators of industrial process refrigeration equipment takes the appliance off-line, or if the owners or operators of federally-owned commercial refrigeration or of federally-owned comfort cooling appliances who are granted additional time under paragraphs (i)(1) or (i)(5) of this section take the appliance off-line, they cannot bring the appliance back on-line until an initial verification test indicates that the repairs undertaken in accordance with paragraphs (i)(1)(i), (ii), (iii), or (i)(2)(i) and (ii), or (5)(i), (ii), and (iii) of this section have been successfully completed, demonstrating the leak or leaks are repaired. The owners or operators of the industrial process refrigeration equipment, federally-owned commercial refrigeration appliances, or federally-owned comfort cooling appliances are exempted from this requirement only where the owners or operators will retrofit or retire the industrial process refrigeration equipment, federally-owned commercial refrigeration appliance, or federally-owned comfort cooling appliance in accordance with paragraph (i)(6) of this section. Under this exemption, the owner or operators may bring the industrial process refrigeration equipment, federally-owned commercial refrigeration appliance, or federally-owned comfort cooling appliance back on-line without successful completion of an initial verification test.

(ii) If the follow-up verification test indicates that the repairs to industrial process refrigeration equipment, federally-owned commercial refrigeration equipment, or federally-owned comfort cooling appliances have not been successful, the owner or operator must retrofit or retire the equipment in accordance with paragraph (i)(6) and any such longer time period as may apply under paragraphs (i)(7)(i), (ii) and (iii) or (i)(8)(i) and (ii) of this section. The owners and operators of the industrial process refrigeration equipment, federally-owned commercial refrigeration equipment, or federally-owned comfort cooling appliances are relieved of this requirement if the conditions of paragraphs (i)(3)(iv) and/or (i)(3)(v) of this section are met.

* * * * *

(5) Owners or operators of comfort cooling appliances normally containing more than 50 pounds of refrigerant and not covered by paragraph (i)(1) or (i)(2) of this section must have leaks repaired in accordance with paragraph (i)(9) of this section if the appliance is leaking at a rate such that the loss of refrigerant will exceed 15 percent of the total charge during a 12-month period, except as described in paragraphs (i)(6), (i)(8) and (i)(10) of this section and paragraphs (i)(5)(i), (i)(5)(ii) and (i)(5)(iii) of this section. Repairs must bring the annual leak rate to below 15 percent.

* * * * *

(6) Owners or operators are not required to repair leaks as provided in paragraphs (i)(1), (i)(2), and (i)(5) of this section if, within 30 days of discovering a leak greater than the applicable allowable leak rate, or within 30 days of a failed follow-up verification test, or after making good faith efforts to repair the leaks as described in paragraph (i)(6)(i) of this section, they develop a one-year retrofit or retirement plan for the leaking appliance. Owners or operators who decide to retrofit the appliance must use a refrigerant or substitute with a lower or equivalent ozone-depleting potential than the previous refrigerant and must include such a change in the retrofit plan. Owners or operators who retire and replace the appliance must replace the appliance with an appliance that uses a refrigerant or substitute with a lower or equivalent ozone-depleting potential and must include such a change in the retirement plan. The retrofit or retirement plan (or a legible copy) must be kept at the site of the appliance. The original plan must be made available for EPA inspection upon request. The plan must be dated, and all work performed in accordance with the plan must be completed within one year of the plan's date, except as described in paragraphs (i)(6)(i), (i)(7), and (i)(8) of this section. Owners or operators are temporarily relieved of this obligation if the appliance has undergone system mothballing as defined in § 82.152.

(i) If the owner or operator has made good faith efforts to repair leaks from the appliance in accordance with paragraphs (i)(1), (i)(2), or (i)(5) of this section and has decided prior to completing a follow-up verification test, to retrofit or retire the appliance in accordance with paragraph (i)(6) of this section, the owner or operator must develop a retrofit or retirement plan within 30 days of the decision to retrofit or retire the appliance. The owner or operator must complete the retrofit or retirement of the appliance within one year and 30 days of when the owner or operator discovered that the leak rate exceeded the applicable allowable leak rate, except as provided in paragraphs (i)(7) and (i)(8) of this section.

* * * * *

■ 10. Section 82.166 is amended by revising paragraphs (n), (o)(4), (o)(7), (o)(8), (o)(10), and paragraph (q) introductory text to read as follows:

§ 82.166 Reporting and recordkeeping requirements.

* * * * *

(n) The owners or operators of appliances must maintain on-site and report to EPA Headquarters at the address listed in § 82.160 the information specified in paragraphs (n)(1), (n)(2), and (n)(3) of this section, within the timelines specified under § 82.156 (i)(1), (i)(2), (i)(3) and (i)(5) where such reporting or recordkeeping is required. This information must be relevant to the affected appliance.

(1) An initial report to EPA under § 82.156(i)(1)(i), (i)(2), or (i)(5)(i) regarding why more than 30 days are needed to complete repairs must include: Identification of the facility; the leak rate; the method used to determine the leak rate and full charge; the date a leak rate above the applicable leak rate was discovered; the location of leak(s) to the extent determined to date; any repair work that has been completed thus far and the date that work was completed; the reasons why more than 30 days are needed to complete the work and an estimate of when the work will be completed. If changes from the original estimate of when work will be completed result in extending the completion date from the date submitted to EPA, the reasons for these changes must be documented and submitted to EPA within 30 days of discovering the need for such a change.

(2) If the owners or operators intend to establish that the appliance's leak rate does not exceed the applicable allowable leak rate in accordance with § 82.156(i)(3)(v), the owner or operator must submit a plan to fix other outstanding leaks for which repairs are planned but not yet completed to achieve a rate below the applicable allowable leak rate. A plan to fix other outstanding leaks in accordance with § 82.156(i)(3)(v) must include the following information: The identification of the facility; the leak rate; the method used to determine the leak rate and full charge; the date a leak

rate above the applicable allowable leak rate was discovered; the location of leak(s) to the extent determined to date; and any repair work that has been completed thus far, including the date that work was completed. Upon completion of the repair efforts described in the plan, a second report must be submitted that includes the date the owner or operator submitted the initial report concerning the need for additional time beyond the 30 days and notification of the owner or operator's determination that the leak rate no longer exceeds the applicable allowable leak rate. This second report must be submitted within 30 days of determining that the leak rate no longer exceeds the applicable allowable leak rate.

(3) Owners or operators must maintain records of the dates, types, and results of all initial and follow-up verification tests performed under § 82.156(i)(3). Owners or operators must submit this information to EPA within 30 days after conducting each test only where required under § 82.156 (i)(1), (i)(2), (i)(3) and (i)(5). These reports must also include: Identification and physical address of the facility; the leak rate; the method used to determine the leak rate and full charge; the date a leak rate above the applicable allowable leak rate was discovered; the location of leak(s) to the extent determined to date; and any repair work that has been completed thus far and the date that work was completed. Submitted reports must be dated and include the name of the owner or operator of the appliance, and must be signed by an authorized company official.

* * * * *

(o) * * *

(4) The date a leak rate above the applicable allowable rate was discovered.

* * * * *

(7) A plan to complete the retrofit or retirement of the system;

(8) The reasons why more than one year is necessary to retrofit or retire the system;

* * * * *

(10) An estimate of when retrofit or retirement work will be completed. If the estimated date of completion changes from the original estimate and results in extending the date of completion, the owner or operator must submit to EPA the new estimated date of completion and documentation of the reason for the change within 30 days of discovering the need for the change, and must retain a dated copy of this submission.

* * * * *

(q) Owners or operators choosing to determine the full charge as defined in § 82.152 of an affected appliance by using an established range or using that methodology in combination with other methods for determining the full charge as defined in § 82.152 must maintain the following information:

* * * * *

[FR Doc. 05–429 Filed 1–10–05; 8:45 am]

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Federal Register

Vol. 70, No. 7

Tuesday, January 11, 2005

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REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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This is the first in a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

A cumulative List of Public Laws for the second session of the 108th Congress will appear in the issue of January 31, 2005.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 241/P.L. 109-1

To accelerate the income tax benefits for charitable cash contributions for the relief of victims of the Indian Ocean tsunami. (Jan. 7, 2005; 119 Stat. 3)

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